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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 276

GEORGE COUPPER GIBBS, INDIVIDUALLY AND AS
ATTORNEY GENERAL OF THE STATE OF FLOR-
IDA, ET AL, APPELLANTS,

VS.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT
OF THE AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF FLORIDA

FILED AUGUST 15, 1933.

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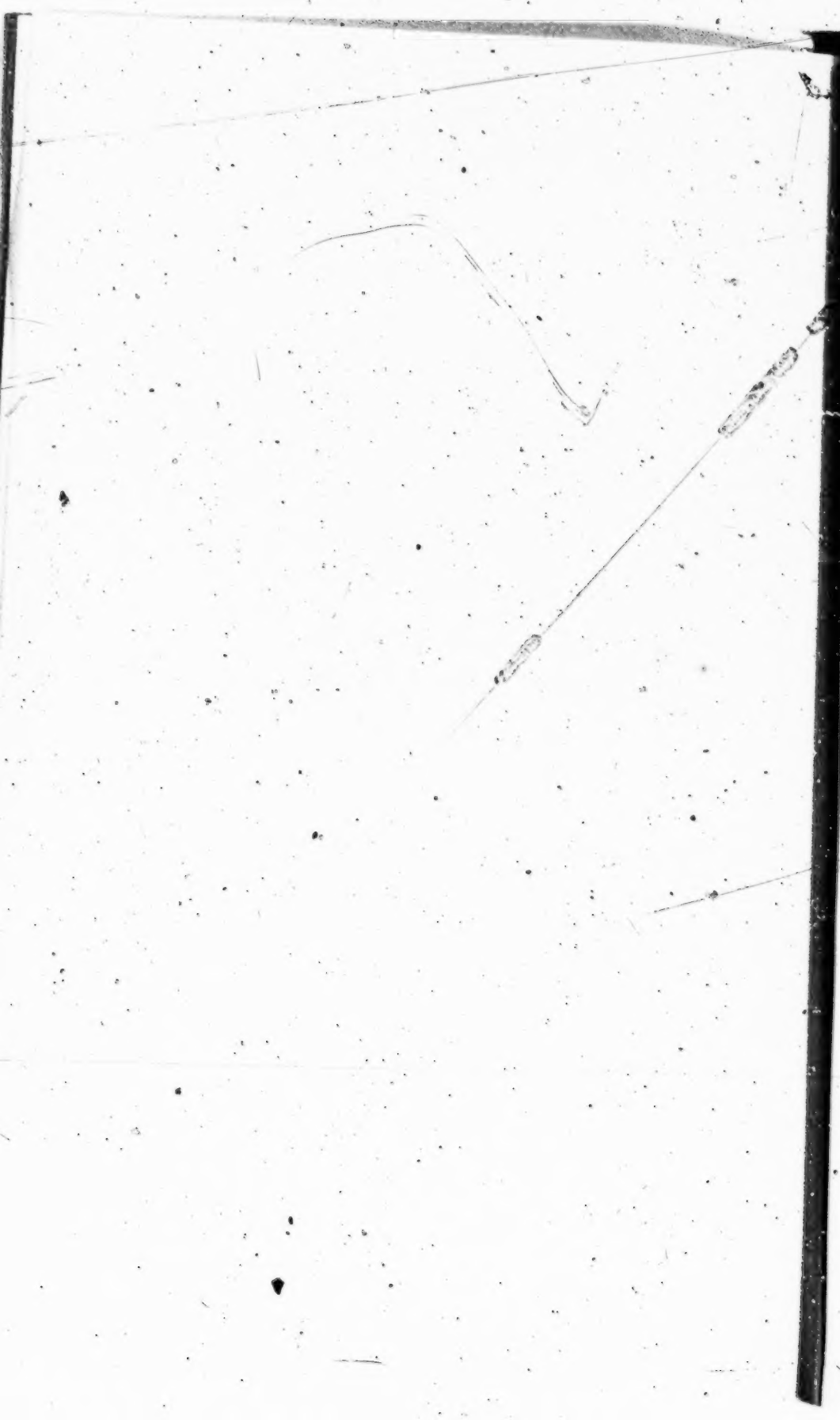
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**IN UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF FLORIDA, GAINSVILLE DIVISION**

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

CARY D. LANDIS, Individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., Individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., Individually, and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, Individually, and as State Attorney for the Third Judicial Circuit of Florida; William A. Hallöwes, III, Individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, Individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, Individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, Individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. Adkins, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, Individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, Individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, Individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Roy D. Stubbs, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, Individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "John Doe" and "Richard Roe", Defendants

BILL OF COMPLAINT—Filed February 7, 1938

Complainants, suing on behalf of themselves and others similarly situated bring this Bill of Complaint against the aforementioned defendants, and allege as follows:

1. The Complainant, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the "Society"), at all times hereinafter [fol. 2] mentioned, was and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Florida, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do.

2. Complainant, Gene Buck is President of said Society; because said membership, as is above indicated, is exceedingly numerous and it would be impracticable to join all the members of said Society as parties plaintiff, and as the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by Gene Buck as President, for and on behalf of said Society, as well as in his own individual right.

3. Complainant, Carl Fischer, Inc., is a corporation, duly organized and existing under and by virtue of laws of the State of New York, having its principal place of business in the City of New York in said State; complainant G. Schirmer, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, [fol. 3] having its principal place of business in the City of New York in said State; complainant, Irving Berlin, Inc., is

a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; all of said last mentioned complainants have been for upwards of twenty-five years and are presently engaged in the business of publishing musical compositions in the State of New York and elsewhere, and are hereinafter for brevity's sake referred to as "Publishers".

4. Complainant, Gene Buck, for upwards of twenty years has been and now is an author of lyrics of musical compositions; complainant, Deems Taylor, for upwards of fifteen years has been and now is a composer of musical and dramatico-musical works; complainant, Oley Speaks, for upwards of fifteen years has been and now is a composer of musical compositions; complainant, William J. Hill, for upwards of five years has been and now is a composer of musical compositions; complainant, Anne Paul Nevin, is the widow of Ethelbert Nevin, who was for more than twenty years a composer of musical compositions, and who departed this life in 1901; complainant, Ella Herbert Bartlett, is the daughter of Victor Herbert, who was for over twenty years a composer and who departed this life in the year 1924; complainant, Jane Sousa, is the widow of John Philip Sousa, who was for more than thirty years a composer and who departed this life in the year 1932, having been a member of the Society for many years. All of the complainants in this paragraph mentioned are citizens of the United [fol. 4] States and all are residents and citizens of the State of New York, and of the Southern District of New York, with the exception of Buck and Sousa, who are residents of the Eastern District of New York, and Nevin, who is a resident and citizen of the State of Maine.

5. Upon information and belief, the defendant, Cary D. Landis, is the duly elected, appointed, qualified and acting Attorney General of said State; the defendant, E. Dixie Beggs, Jr., is the duly elected, appointed, qualified and acting State Attorney for the First Judicial Circuit in said State; the defendant, O. C. Parker, Jr., is the duly elected, appointed, qualified and acting State Attorney for the Second Judicial Circuit in said State; the defendant, A. K. Black, is the duly elected, appointed, qualified and acting State Attorney for the Third Judicial Circuit in said State; the defendant William A. Hallows, III is the duly elected,

appointed, qualified and acting State Attorney for the Fourth Judicial Circuit in said State; the defendant, J. W. Hunter, is the duly elected, appointed, qualified and acting State Attorney for the Fifth Judicial Circuit in said State; the defendant, Chester B. McMullen, is the duly elected, appointed, qualified and acting State Attorney for the Sixth Judicial Circuit in said State; the defendant, Murray Sams, is the duly elected, appointed, qualified and acting State Attorney for the Seventh Judicial Circuit in said State; the defendant, J. C. Adkins, is the duly elected, appointed, qualified and acting State Attorney for the Eighth Judicial Circuit in said State; the defendant, Murray W. Overstreet, is the duly elected, appointed, qualified and acting State Attorney for the Ninth Judicial Circuit in said State; the defendant, L. Grady Burton, is the duly elected, appointed, qualified and acting State Attorney for the Tenth [fol. 5] Judicial Circuit in said State; the defendant, G. A. Worley, is the duly elected, appointed, qualified and acting State Attorney for the Eleventh Judicial Circuit in said State; the defendant, Roy D. Stubbs, is the duly elected, appointed, qualified and acting State Attorney for the Twelfth Judicial Circuit in said State; the defendant, J. Rex Farrior, is the duly elected, appointed, qualified and acting State Attorney for the Thirteenth Judicial Circuit in said State; defendant John H. Carter, Jr., is the duly elected, appointed, qualified and acting State Attorney for the Fourteenth Judicial Circuit in said State; defendant Louis F. Maire is the duly elected, appointed, qualified and acting State Attorney for the Fifteenth Judicial Circuit in said State; and the defendants, "John Doe" and "Richard Roe", are the duly elected, appointed, qualified and acting officials of the State of Florida, whose names are at present unknown to complainants, who are also charged with the enforcement of Senate Bill No. 679, enacted by the Legislature of Florida, and signed by the Governor of that State on June 9th, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute"), and each of said defendants is a citizen and resident of the State of Florida.

6. The value of the matter in dispute herein between complainants and defendants is in excess of the sum of \$3,000.00, exclusive of interest and costs.

7. This action is a suit in equity arising under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of the said Statute of certain rights, privileges and [fol. 6] immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of Florida, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted musical compositions, which has been vested in the complainant Society for a limited period, as hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article 1, Section 8 of the Constitution of the United States, and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078 U. S. Code, Title 17); to repress and prevent the deprivation of such rights without due process of law and without the equal protection of the laws, and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of the said State Statute as an ex post facto law, and to repress and prevent the interference by the State of Florida with the federal judicial power and the privileges of complainants as citizens of the United States by denying the complainants the right of access to the Federal Courts; to repress and prevent a compulsory, irrevocable grant of special privileges to the users of complainants' copyrighted music in the State of Florida in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement [fol. 7] of said State Statute as a special law granting to corporations, associations or individuals a special privilege and retroactive in its operations; and this suit, among other things, involves the question as to whether or not each of the complainants may combine with a substantial number of other persons, corporations or associations for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Florida and without doing any act within the State of

Florida; whether or not the complainants have the right to issue to citizens of Florida licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants, apart from the sale of copies of such compositions in the form of sheet music; whether the complainants have the right to act collectively in combination with a substantial number of persons, corporations or associations for the purpose of granting blanket licenses at fixed fees for the public performance for profit of the complainants' copyrighted musical compositions to users located within the State of Florida; whether the State of Florida has the right to require and compel complainants to fix a price for their copyrighted musical compositions for all uses and purposes and to affix such price upon the musical composition in whatever form the same may be published, printed, manufactured, or otherwise prepared for use or rendition; whether the State of Florida has the right to declare void and unenforceable all existing contracts, agreements, licenses and arrangements made by complainants with or granted to users in the State of Florida; whether the State of Florida may impose a [fol. 8] penalty upon complainants for collecting or attempting to collect the moneys due them under said existing contracts; whether the State of Florida has the right to grant to owners, lessees, operators or managers of radio broadcasting, radio receiving or radio rebroadcasting stations within that State, the right to receive, broadcast and rebroadcast complainants' copyrighted musical compositions without the payment to complainants of any license fee or other compensation for such use; whether the State of Florida has the right to grant to owners, lessees, operators or managers of any theatre, moving picture house or similar place for amusement and public performance within Florida, the right to receive, use and render or cause to be received, used or rendered the copyrighted musical compositions of the combinations declared unlawful by said Statute, including the musical compositions of complainants, without the payment to complainants of any license fee or other compensation for such use; whether the State of Florida has the right to prevent the complainants from suing users in Florida for infringement of their respective copyrighted musical compositions or for loss or damage within Florida for the use or rendition, including the public performance for profit, of their respective copyrighted musi-

cal compositions originating or emanating from outside the State of Florida and performed, rendered or otherwise used within said State; whether the State of Florida has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Florida, by providing that any representative of any combination declared to be unlawful under said State Statute shall be deemed an official representative and agent of such combination and shall [fol. 9] be construed to be doing business within Florida, and that service of any process may be had against complainants and others similarly situated by service upon said representative or the agent of any such representative, with the same force and effect as if service were made upon the duly elected officer or acting agent or other official representative; whether the State of Florida may prevent complainants from engaging an agent in said State, by enacting that any such agent shall be subject to the penal provisions of the said State Statute; whether the State of Florida may dissolve the Society, which is organized under the laws of the State of New York and has its principal place of business therein, by an action brought within the State of Florida for committing any of the acts specified in said Statute to be in violation thereof upon service secured by service upon any representative that the Society may have within said State; whether the State of Florida may require the complainants and others similarly situated under penalty of being held in contempt of Court and being fined \$100.00 for every day that they shall fail or refuse to furnish such documents, to file with the Clerk of the Court in which any civil or criminal action or proceeding is pending against complainants, or others similarly situated, exact copies of all documentary evidence, records or data in the possession or under the control of complainants and others similarly situated (being defendants in such suit or proceeding) pertaining to the issues in said action; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including, fine, imprisonment, [fol. 10] contempt and penalties therein provided for, and whether or not the defendants, in threatening to enforce the provisions of said State Statute against complainants are not depriving the complainants of their property and their right to liberty without due process of law, and whether they are not denying the complainants the equal protection

of the laws; whether the State of Florida may compel complainants and others similarly situated to be witnesses against themselves and be subjected to unlawful search and seizure, and whether the State of Florida may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies, who have authorized the Society to grant blanket licenses in the United States on their behalf, which conditions are not embraced in, but are in conflict with existing Treaties, Presidential Proclamations, and the Copyright Act of the United States.

This suit is brought to repress and prevent defendants from proceeding under and by virtue of the provisions of said State Statute, and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment and penalties under the color of said State Statute.

8. The Publishers, in furtherance of their business of publishing musical compositions, acquired from writers and composers the right to publish musical compositions written and composed by such writers and composers, respectively, either by outright purchases of such rights or upon a royalty basis and will in the ordinary and usual course of their business continue to acquire similar rights in many thousands of musical compositions; in the great majority of [fol. 11] cases, complainants acquired and will in the ordinary and usual course of their business continue to acquire from such writers and composers the right to secure copyright in the compositions purchased by Publishers; when such compositions are published by Publishers, two of the best copies thereof are deposited with the Register of Copyrights at Washington, D. C., and the required fee paid to him with a claim for copyright registration, and said compositions are always registered for copyright with the Register of Copyrights in Washington, D. C., pursuant to the provisions of the Copyright Act of 1909 (hereinafter referred to as the "Copyright Act"), and on each and every one of the compositions published by publishers there appears upon the first page of music at the foot thereof, the copyright notice prescribed by said Copyright Act; each of the Publishers in the course of its many years of conducting its respective business, has registered many thousands of compositions with the Register of Copyrights, and each

has secured for its respective corporation the ownership of the copyright in many thousands of musical compositions; in the music business or trade the totality of copyrights of a particular publisher is known as its "catalogue"; the great majority of each Publisher's respective catalogue is likewise copyrighted in foreign countries, as well, and copyright protection is obtained by said publishers for their catalogues in almost every civilized country of the world; none of the copyrights owned by the complainants has a situs within the State of Florida; that each publisher's business is extensive, and that the value of the copyrights owned by each publisher is in excess of \$1,000,000.00; old copyrights expire currently and are renewed, sometimes by the publisher and sometimes by the writer and composer, or [fol. 12] such others as may be entitled to renewal under the Copyright Act, and new compositions are constantly being registered; the rights in the copyrights are manifold and many of them are and have been granted by the Publishers to others separate and apart from other rights and are subdivided as to locality, extent and term; in many cases certain rights are reserved to the author or composer and disposition thereof is not within the control or knowledge of the publisher complainant, and is not ascertainable.

9. Each of the publishers has secured copyright registration in many thousands of musical compositions of which copyrights each of said publishers is respectively the proprietor; said copyrights have been secured in manner similar to that described hereinabove, and with respect to each of said copyrights, the publishers have respectively obtained copyright cards, and all such copyrights are on file in the office of the Register of Copyrights in Washington, D. C., as prescribed by Statute, and copies of such cards are not annexed hereto in order to avoid unduly encumbering this complaint, but reference is made hereto and the same are incorporated herein, and copies of said cards will be produced upon the trial of this case, if necessary.

10. Complainant Gene Buck wrote the lyrics of many musical compositions, for over twenty years last past, and from time to time he entered into contracts with various music publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works, as required by the Copyright Act; said copyrights expire by limitation

of time at various dates in the future, and complainant Buck is advised and verily believes, that he is entitled to secure [fol. 13] a renewal of each such copyright for an additional period of twenty-eight years, in his own name and on his own behalf, in each of said works; in such renewals of copyright, complainant Buck will have all the rights that vested in the proprietor of the original copyrights; among such works are the following: "Tulip Time", "Hello Frisco", "Garden of My Dreams", "No Foolin'", "The Love Boat", "Florida, The Moon and You"; for over fifteen years, complainant Buck wrote the words and lyrics for the Florenz Ziegfeld Follies, as well as the words and lyrics of other musical shows produced with great success; Buck's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000.

11. Complainant Deems Taylor composed the music for two musical compositions entitled "Banks O' Doon" and "Captain Stratton's Fancy", in 1923, and entered into a contract for the publication of said compositions with J. Fischer & Bro., a music publisher; a copy of said contract is hereto annexed and marked Exhibit "A"; said publisher secured copyright of said compositions by publication and deposit of the work, as required by the Copyright Act, in and about the year 1923, and said copyrights expire by limitation of time in the year 1951, and complainant Taylor is advised and verily believes, that he is entitled to secure a renewal of said copyrights for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyrights, complainant Taylor will have all the rights vested in the proprietor of the original copyrights; the complainant Taylor has composed the music for a great many other works, among them "The King's [fol. 14] Henchman", "Peter Ibbetson" and "Through A Looking Glass Suite"; "Peter Ibbetson" has been successfully produced at the Metropolitan Opera House in the City of New York; Taylor's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000. Under said contract, Exhibit "A", and other contracts between complainant Taylor and his publisher, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by

his publisher averaging about 10% thereof. Under the contract between complainant Taylor and the Society, complainant Taylor is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Taylor receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if said Statute be enforced, complainant Taylor will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions; and said Taylor will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

12. Complainant Oley Speaks composed the music for many musical compositions and entered into numerous contracts for the publication of said compositions with the complainant G. Schirmer, Inc., a music publisher; said publisher secured copyrights in said compositions by publication, deposit and registration of the works, as required by the [fol. 15] Copyright Act, and said copyrights will expire by limitation of time at various dates in the future, twenty-eight years from the respective dates of registration of said works; and complainant Speaks is advised and verily believes that he is entitled to secure renewals of said copyrights for an additional period of twenty-eight years respectively, in each one in his own name and on his own behalf; in such renewals of copyright complainant Speaks will have all the rights that vested in the proprietor of the original copyrights; among the works composed by Speaks are the following: "Sylvia", "Road to Mandalay" and "Morning"; Speaks' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of \$100,000. Under the contracts between complainant Speaks and his publishers, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Speaks and the Society, complainant Speaks is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him;

in other words, complainant Speaks receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Speaks will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, and said Speaks will have no [fol. 16] right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

13. Complainant Hill composes music, and he has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., a music publisher who has secured copyrights of said compositions by publication, deposit and registration of such works as required by the Copyright Act, and said copyrights expire by limitation of time at various dates in the future, twenty-eight years from the date of registration of such respective works, and the complainant Hill is advised and verily believes that he is entitled to secure renewals of said copyright for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyright complainant Hill will have all the rights that vested in the proprietor of the original copyrights; the complainant Hill has composed the music for a great many works, among them "The Last Roundup", "Chapel in the Moonlight", "The Old Spinning Wheel", "Lights Out", "Wagon Wheels", "Empty Saddles", "The Glory of Love" and "Timber"; Hill's right to collect royalties from his works, as aforementioned; as well as his right to secure renewals of copyright therein are worth in excess of \$100,000. Under the contracts between complainant Hill and his publishers, said complainant is entitled to receive a certain royalty on every copy of sheet music sold by his publisher averaging about one and one-half cents on each such sale. Under the contract between complainant Hill and the Society, com-[fol. 17] plainant Hill is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Hill receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, com-

plainant Hill will be entitled to receive only an average of 6% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, since such sheets of music are ordinarily sold for about twenty-five cents; and said Hill will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

14. Complainant Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed, among others, the following musical compositions which were duly published and copyrighted: "The Rosary", "Mighty Lak a Rose", "Venetian Suite" and "Narcissus," and she has obtained renewals of some of said compositions in her own name, and is advised and verily believes that she will be entitled under the copyright act to obtain renewals of all of such compositions as and when the original terms thereof expire, during her lifetime; Ella Herbert Bartlett is the daughter of Victor Herbert, the foremost composer in America, who wrote and composed, among others, the following works, all of which were duly registered for copyright: "Kiss Me Again", "Natoma", "Sweet Mystery of Life", "I'm Falling in [fol. 18] Love With Someone", "Mlle. Modiste", "Red Mill", "Naughty Marietta", "Irish Fantasy" and "Pan Americana"; she has renewed some of the works on which the original term of copyright has expired, and is advised and believes that she will be entitled to renew the other works as and when they expire; Jane Sousa is the widow of John Phillip Sousa, who wrote and composed a great many compositions, and who was known as the "March King"; among his compositions are the following: "Stars & Stripes Forever", "Adeste Fidelis", "Washington Post March" and "El Capitan"; said compositions were duly registered for copyright, and said complainant Jane Sousa has renewed some of said compositions, and is advised and believes that she will have the right to renew the other works as and when they expire; the rights, which the complainants mention in this paragraph have, in the renewal of the works written and composed respectively by the husbands and father of said complainants, are of great value and are worth in excess of \$100,000. with respect to each of said complainants. Under their respective contracts with their publishers, said complainants are entitled to receive a certain percentage of the market or retail price on every copy

of sheet music sold by their publishers averaging about 10% thereof. Under the respective contracts between said complainants and the Society, said complainants are entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to them; in other words, said complainants receive approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of their copyrighted musical compositions; if the [fol. 19] said Statute be enforced, said complainants will be entitled to receive only an average of 10% of the moneys paid to their respective publishers by users in Florida publicly performing for profit their respective copyrighted musical compositions, and said complainants will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

15. Prior to 1917, none of complainants, nor the respective husbands and father of complainants mentioned in the next preceding paragraph, received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; although the copyright Statute gave to the complainants the exclusive right to publicly perform for profit their respective musical compositions, users of musical compositions throughout the country refused to recognize such exclusive rights in complainants, and persistently and stubbornly refused to pay any royalties for such public performance for profit, but, on the contrary, users of music throughout the country publicly performed for profit the musical compositions owned, written and composed by complainants respectively, without payment of any royalties; complainants and others similarly situated were unable to enforce their exclusive rights in the public performance for profit of their compositions; individually they had no means of enforcing such rights; they could not employ investigators throughout the country to detect infringement because such public performances for profit were fugitive, fleeting and ephemeral, and no record was made by users [fol. 20] of such performances; complainants had no effective means of employing lawyers throughout the United States to bring infringement suits against users for the wrongful public performance for profit of their musical compositions; and complainants and others similarly situated

were helpless to enforce the rights granted to them by the Copyright Act; those of the users of music who might be willing or inclined to pay for the public performance for profit of the compositions of complainants and those similarly situated, were unable to do so because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; under such circumstances it was impossible to get in touch with the individual owners of the particular musical compositions, many of whom were scattered throughout the world; the users of music, consisting primarily of hotel owners, innkeepers, cabaret and dance hall proprietors and motion picture exhibitors, were organized into very powerful trade associations who employed counsel to defend such users against claims of infringement for the unauthorized performance of public performance of musical works of complainants, and others similarly situated, and such associations of users even offered to defend infringers who were not members of their respective associations.

16. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Perlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, [fol. 21] Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Whitmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a voluntary unincorporated non-profit association under the laws of the State of New York, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not and does not deal in any commodity, did not and does not deal in any sheet music, exercised and exercises no function with respect to mechanical rights of reproduction, and was and is limited solely as aforesaid to the right of public performance for profit; said Society has functioned continuously since said date; from its very commencement it encountered tremendous opposition on the part of organized groups of users of music throughout the country; one of the functions of the Society was to detect infringements of the right of public performance for profit of its members and to insti-

tute suits on behalf of its members for such infringements; it also licensed establishments throughout the country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees; the organized groups of users of music resisted efforts to compel them to pay compensation for the performance for profit of the Society's members; with the advent of radio broadcasting in 1922, powerful groups of radio broadcasters throughout the United States joined with the other groups, [fol. 22] aforementioned, in opposing the Society; such groups of users attacked the Society by interposing defenses in suits for infringement, by complaints made to the Attorney-General of the United States, by a suit brought against the Society in the State of New York, by attempts made annually in Congress for over fifteen years last past to amend the Copyright Act so as to permit the users of music to publicly perform for profit the musical compositions of the Society's members without compensation, by initiating tax legislation in various States, and lately by introducing into various States bills similar to the Statute of the State of Florida herein complained of, with a view of destroying and nullifying the rights of the Society's members given to them by the Copyright Act.

17. At the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society the exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time, the last contracts were signed prior to and became operative January 1, 1936; annexed hereto and made part of this complaint is the contract entered into on the 12th day of April, 1935 between complainant Carl Fischer, Inc. and the Society and marked Exhibit "B"; annexed hereto and made part of this complaint is the contract entered into on the 25th day of June, 1935 between [fol. 23] complainant Gene Buck and the Society and marked Exhibit "C"; the other complainants, G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, prior to January 1, 1936, executed and delivered to the Society

contracts in form similar to the contracts entered into between the Society and Carl Fischer, Inc. and Gene Buck; all of said contracts executed and delivered by the complainants to the Society expire by limitation of time on the 31st day of December, 1940; all of the publisher members of the Society have executed contracts similar to Exhibit "B"; all of the other members of the Society have executed contracts similar to Exhibit "C".

18. Annexed hereto and made a part of this complaint and marked Exhibit "D" are the present Articles of Association of the Society.

19. Complainants' respective businesses and occupations are lawful ones, and the pursuit thereof cannot be prohibited directly or indirectly; the rights vested in the complainants by the Constitution of the United States and the Copyright Laws enacted by the Congress thereunder are exclusive and cannot be limited, curtailed, forfeited, confiscated or circumscribed by any of the Statutes of the several States, including the State of Florida.

20. The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their income, power and coverage, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of the particular composition played; such licenses include likewise the right on the part of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts, so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and pub-

lishers; said rights granted by the Society are of great value to the users who have consistently and uniformly objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; and the Society since 1914 has looked after the interests not only of its own members, but of other members of the musical profession who have been in distress by reason of age and indulgence and who otherwise have been unable to support themselves, and the Society has paid sick benefits [fol. 25] to such individuals, as well as to its members, and has looked after the widows and orphans of indigent composers and writers throughout the United States whose families would otherwise have been objects of public charity; the individual complainants herein have neither the resources, funds, organization or ability to protect the musical copyrighted works in which they are authors and composers, or which they own, or in which they have renewal rights, or obtain renewals, against infringement by unauthorized performances for profit within the State of Florida in their individual capacity, and have been compelled, as aforesaid, to unite and combine for the purpose of preventing such infringement and enforcing the rights granted to them under the Copyright Act, and such rights cannot be enforced by said individual complainants without such combination; if the individual complainants were to create an agency within the State of Florida to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Florida and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of \$10,000., which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers.

21. Upon information and belief the State Statute was sponsored by an organized group of radio broadcasters and other users of music in an endeavor to destroy the Society

so that they might have for their own selfish aggrandizement free access to all musical compositions without compensation; said group of users caused a similar statute to be enacted by the State of Montana in or about February, 1937, known as Chapter 90 of the Laws of 1937 of the State of Montana; and they caused to be enacted in the State of Washington in or about March, 1937, a similar statute known as Chapter 218 of the Laws of 1937 of the State of Washington; and a similar statute in the State of Nebraska, known as Legislative Bill No. 478 of the Laws of 1937, and a similar statute of the State of Tennessee, known as Chapter 212 of the Public Acts of 1937; and similar bills have been prepared by such group of users who have circularized the legislatures of other States with a view to presenting to them for enactment similar statutes in all the forty-eight States; said State Statute was passed by the legislature of the State of Florida (as were the similar bills passed by the legislatures of the States of Montana, Washington, Nebraska and Tennessee) without an adequate opportunity for a hearing being afforded to complainants and others similarly situated. The following radio broadcasting stations in the State of Florida are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society, as well as for other purposes:

[fol. 27]

Station	Owner	Location
WFLA	Florida West Coast Broadcasting Company, Inc.	Clearwater
WRUF	State and University of Florida	Gainesville
WMBR	Florida Broadcasting Co.	Jacksonville
WIOD	The Isle of Dreams Broadcasting Corp.	Miami
WQAM	Miami Broadcasting Co., Inc.	Miami
WDBO	Orlando Broadcasting Co.	Orlando
WSUN	Chamber of Commerce of St. Petersburg	St. Petersburg
WDAE	The Tampa Times Company	Tampa

22. Annexed hereto and made a part of this complaint is a copy of the State Statute marked Exhibit "E".

23. The Society pursuant to the rights vested in it by the contracts made with complainants herein, and others

similarly situated, has for many years entered into numerous contracts which are now in force between it, acting on behalf of and jointly for all the members of Society and for the joint benefit of all such members, and users of music within the State of Florida. Under these contracts the Society has licensed such users to publicly perform for profit the musical compositions of its members; under these contracts, the Society licenses the users to perform all of the compositions in the repertoire of the Society and its affiliated foreign societies for a single license fee, fixed and determined by the Society in negotiations with the respective users.

With respect to radio broadcasters, the Society, after extensive negotiations with the National Association of Broadcasters, has charged a sustaining fee based upon the power, wattage, listening audience and other important factors connected with each station, plus a fixed percentage of the revenues derived by each radio broadcasting station from its sponsored programs, after making certain deductions.

With respect to motion picture theatres, the Society negotiated for a long time with the trade associations of theatre owners, and finally, a rate of ten cents per seat per theatre was agreed upon as a fair and reasonable rate. That rate was in operation for a great many years. Recently, in negotiations with the theatre owner associations, the rate was modified so that it is now, as follows:

- 10¢ per seat per year for theatres containing 800 seats and under;
- 15¢ per seat for theatres containing 801 to 1599 seats;
- 20¢ per seat above that number; and
- 5¢ per seat for all theatres under 800 seats, operating only three days a week.

The uniform rate for hotels with radio in each room is \$1.00 per room per year; in addition thereto, there is an annual rate for hotels having orchestras or giving other musical entertainment for the profit of the management, based upon the size, prestige, gross business, nature of entertainment, size of the orchestra, extent of music used and audiences attracted thereby, and the profits derived therefrom.

The license fees in all these cases are fixed and determined by the Society on behalf of all its members, after negotiations with either the trade association or the individual

user; there are about 367 contracts in force at the present [fol. 29] time from which the Society received for the year 1936 the sum of \$59,306.81; on or about the 15th day of January 1936, the Society entered into a contract with Isle of Dreams Broadcasting Corporation, proprietor of a radio broadcasting station having call letters WIOD, a copy of which is hereto annexed and made a part hereof and marked Exhibit "F", which contract is presently in force and effect, and has been duly performed both by the Society and by the radio broadcasting station; in addition to said contract, there are 11 other contracts made between the Society and the radio broadcasters in the State of Florida similar to Exhibit "F" presently in force and up to the enactment of said State Statute performed both by the Society and each respective broadcaster; on or about the 28th day of November, 1936, the Society entered into a contract with Marianna Theatres, Inc., proprietor of a motion picture theatre, known as the Ritz Theatre, Panama City, Florida, a copy of which is hereto annexed and made a part hereof and marked Exhibit "G", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the motion picture theatre exhibitor; in addition to said contract, there are 170 other contracts made between the Society and the motion picture theatres in the State of Florida similar to Exhibit "G" presently in force and up to the enactment of said State Statute being performed both by the Society and each respective motion picture theatre exhibitor; on or about the 8th day of January, 1937, the Society entered into a contract with Carling Hotel at Jacksonville, Florida, a copy of which is hereto annexed and made a part hereof and marked Exhibit "H", which contract is presently in [fol. 30] force and effect, and was made up to the enactment of said State Statute duly performed both by the Society and by the hotel owner; in addition to said contract, there are 183 other contracts made between the Society and hotels, restaurants, dance-halls and miscellaneous in the State of Florida similar to Exhibit "H" presently in force and up to the enactment of said State Statute duly performed both by the Society and each respective hotel, restaurant, dance-hall and miscellaneous establishment proprietor.

24. Societies similar in purpose and scope to the Society have been in existence and are organized and operating

under and by virtue of the laws of Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho-Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Roumania, Spain, Sweden and Switzerland.

By virtue of various treaties and proclamations of the Presidents of the United States, issued pursuant to Section 8 of the Copyright Act, and which are now in force between the United States and Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho-Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Roumania, Spain, Sweden and Switzerland, reciprocal rights are granted to citizens of the United States and to citizens of the foreign countries named whereby the citizens of such foreign countries are extended copyright protection within the United States, upon compliance with the Copyright Act with respect to their several musical compositions, and citizens of the United States are extended reciprocal protection, with respect to their several musical compositions, under the copyright acts of said countries [fol. 31] upon complying with the copyright acts thereof. Such reciprocal protection is based upon the determination that certain reciprocal conditions for the enjoyment of copyright exist as between the United States and such respective foreign states or nations, and is accorded under and by virtue of proclamations and treaties establishing the existence of such conditions, and having the force and effect of law.

Under contracts with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies under such contracts have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced

in said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. Their 44,000 members are scattered throughout the world, and they are not required to fix a selling price for all uses of their respective musical compositions in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid:

[fol. 32] 25. Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society, similarly situated, to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Florida by any purchaser of a sheet of music, phonograph record, music roll, electrical transcription or film, who pays the price thereof fixed by the publisher of such composition or the manufacturer of such phonograph record, music roll, electrical transcription or film; under Section 1 (e) of the Copyright Act of 1909, as amended, any manufacturer of parts of instruments serving to reproduce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured, but the Copyright Act provides that the payment of such royalty shall not free such articles or devices from further payment of royalties in case public performances for profit are made by means of such articles or devices; many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions; the Copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and [fol. 33] have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electri-

cal transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public performance for profit thereof. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Florida publicly for profit upon such a basis or on any basis wherein the fee or compensation would be included in the price paid for a copy of the sheet of music of said composition or phonograph record, music roll, electrical transcription or film thereof; complainants believe that such a requirement and compulsory license would deprive them of the exclusive rights vouchsafed to them under the Copyright Law.

26. If each complainant would be required to act independently in order to have the right to determine and fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Florida to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Florida; all the users of [fol. 34] music in the State of Florida paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of \$59,306.81. In the year 1936, users located in the following counties of the State of Florida paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount
Alachula	\$518.39
Bay	137.55
Bradford	27.00
Brevard	414.94
Calhoun	34.40
Citrus	63.00

County	Amount
Clay	7.50
Columbia	90.00
Dade	21,770.36
DeSoto	183.95
Duval	6,161.85
Escambia	1,748.45
Franklin	67.50
Godsen	79.50
Hamilton	23.75
Hernando	30.60
Hillsborough	6,334.10
Holmes	29.30
Jackson	130.40
Jefferson	20.50
Lafayette	20.00
La're C	190.79
Lee	82.27
Leon	535.02 38.20
Madison	38.20
Manatee	1,080.05
Marion	164.56
Monroe	154.00
Nassau	30.00
Okaloosa	20.70
Orange	3,691.61
Osceola	77.00
Palm Beach	1,791.42
Padco	50.00
Pinellas	9,646.40
Polk	1,047.22
Putnam	97.99
St. Johns	181.43
St. Lucie	260.55
Santa Rosa	95.30
Seminole	300.60
Sumter	25.40
Suwanee	40.00
Taylor	40.00
Volusia	1,706.26
Walton	42.00
Washington	25.00
Total	\$59,306.81

The proportion collected from each county represents the approximate proportions that were collected from each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute.

27. Complainants will be able to license users of their music in Florida without doing any act in said State, but unless the injunction prayed for herein is granted, complainants will be unable to issue any licenses from without the State of Florida without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Florida, and a great number of the copyrighted works of the complainants are being constantly performed in the State of Florida, and will continue to be performed in that State.

28. The following radio broadcasting stations within the State of Florida, and their respective locations, are affiliated with, and rebroadcast programs emanating from without the State of Florida, and respectively, in the studios of the Columbia Broadcasting System, Inc., National Broadcasting Co. Inc. and the National Independent Broadcasters, Inc.:

Columbia Broadcasting System, Inc.

Station	Location
WMBR.....	Jacksonville
WQAM.....	Miami
WDBO.....	Orlando
WDAE.....	Tampa
WJNO.....	West Palm Beach
WCOA.....	Pensacola

National Broadcasting Co.

WFLA.....	Clearwater
WJAX.....	Jacksonville
WIOD.....	Miami
WSUN.....	St. Petersburg

National Independent Broadcasters, Inc.

WMFJ.....	Daytona Beach
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[fol. 36] It is a general practice with respect to national networks to have musical programs performed in the City of New York and in other large cities and broadcast from the

radio station where such program is performed. At the same time the program is transmitted by telephone wires to other stations located throughout the country, and particularly the aforementioned broadcasting stations located within the State of Florida so that the broadcast originating in the home studio of the National Broadcasting Company or of the Columbia Broadcasting Company or of the National Independent Broadcasters, Inc., or of the Mutual Broadcasting System, as the case may be, is simultaneously performed by means of a broadcast from the connecting stations, including the abovementioned stations within the State of Florida; the programs broadcast by many stations outside of the State of Florida, whether affiliated or not with any station located within the State of Florida are heard within the State of Florida, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Florida broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Florida.

29. The said State Statute prevents complainants from licensing the broadcasting of their compositions outside of the State of Florida if such broadcast may be heard within or transmitted by wire or otherwise to the State of Florida; it deprives complainants of the means of detecting infringements in the State of Florida; it attempts to de- [fol. 37] prive complainants of unrestricted access to the Federal Court for redress for infringement of their copyrights; it sets up a system of compulsory price-fixing of copyrights in destruction of existing copyrights and of rights to obtain the full benefits of the Copyright Act in securing future copyrights; it interferes with the publication of complainants' copyrighted compositions by compelling them to keep a record of all purchasers of copies or records thereof in the State of Florida, and imposes upon them the impossible task of determining whether public performances for profit were given or authorized by purchasers of the sheets of music or of phonograph or other records thereof in the State of Florida, or whether such performances were made or authorized by persons who had purchased sheets of music or records without that State or

who had obtained so-called "professional" or complimentary copies thereof; unless the enforcement of this State Statute is restrained by this Court, other States in addition to Florida, Montana, Washington, Nebraska and Tennessee may enact similar Statutes requiring complainants to fix a price for all uses in each of such States, or may enact a compulsory price-fixing system entirely different from that enacted in each of the said States, all of which would work undue hardship on complainants and would violate the spirit of the Constitution and the Copyright Laws enacted thereunder.

30. Upon information and belief said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, [fol. 38] licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said State Statute.

31. The complainant publishers, in the regular course of their business, ship sheets of music from New York State into the State of Florida, as well as to all the other States of the Union. This is done solely in connection with their publishing business and has nothing to do with the licensing of the right of public performance for profit or any other rights given to the publishers or copyright owners under the Copyright Act. The purchasers of the sheets of music may use the same for purposes of private performance or for non-profit public performances, but they may not use them for the purpose of making mechanical records or for the purpose of public performance for profit, or for any other uses and purposes granted to the owners of the copyright by the Copyright Act.

The publishers and the Society have kept the sale of sheet music, which is the material object copyrighted, separate and apart from the copyright itself, in accordance with the provisions of the Copyright Act.

Under the State Statute, this right of separability is wholly denied. Under their contracts with the Society, the publishers reserve the right to restrict the public perform-

ance for profit of their musical compositions for the purpose of protecting investments in dramatico-musical productions wherein investments of hundreds of thousands of dollars are involved. Unless the publishers or other copyright owners can assure investors in such productions that there [fol. 39] will be no indiscriminate and wholesale public performances of the "hit" musical compositions in such productions, the production rights will be wholly destroyed. Under the State Statute, the only alternative left to complainant publishers is to wholly refrain from shipping sheets of music through the channels of interstate commerce into the State of Florida, and said State Statute directly compels the complainant publishers to withhold shipping music into said State, except upon condition that they forego rights granted to them under the Constitution and the Copyright Laws of the United States.

32. Upon information and belief, the said State Statute is not a reasonable exercise of the police power; it is a pretext under which the State of Florida is attempting to usurp power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.

33. The system of licensing provided for in said State Statute would deprive complainants and others similarly situated of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted [fol. 40] musical works, and of the right to determine the conditions under which such works might be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof.

34. The defendants, and each of them, individually and as respective officials charged with the duties of enforcing

said State Statute have threatened to, and will enforce such State Statute in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refuse to accept or submit to a system of compulsory licensing; and said defendants have threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for [fol. 41] the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail, or refuse to submit to the jurisdiction of the State Courts of Florida; and defendants have threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

35. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without

the State of Florida if the public performance for profit of such music may be reproduced or performed within the State of Florida. There are 47 counties in the State of Florida, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal contracts, and if complainants attempt to issue licenses or collect from licensees, or attempt to detect in- [fol. 42] fringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable Court; complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by any other means of rendition whatsoever within the State of Florida from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in the State of Florida; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of the State of Florida; complainants and others similarly situated, as well as the Society, have been compelled since the effective date of the Statute, to desist from licensing the public performance for profit of their copyrighted musical compositions in the State of Florida and have been deprived of all sources of revenue therefrom, and have been denied the privileges granted to them by the Copyright Act; and the Society has been compelled to desist from enforcing collection of payments under existing contracts between it and users since the effective date of said Statute, and has been compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of [fol. 43] their respective copyrighted musical compositions, and complainants will continue to suffer as aforesaid unless this Court grant an injunction as prayed for; and the complainants and the Society and its affiliated societies have been and will be hindered, delayed and impeded in enforce-

ing their rights and remedies under the Copyright Act in the Federal Court located in the State of Florida, for infringements committed by users within the State of Florida by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated will be unable to detect and sue for infringement of their copyrighted musical works within the State of Florida; unless this Court shall determine the validity and application of said Statute in this proceeding, complainants and others similarly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Florida, and they will therefore be deprived of their property and liberty without due process of law, and denied the equal protection of the laws, all in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Sections 1, 8, 11, 12 and 22 of the Declaration of Rights of the Constitution of the State of [fol. 44] Florida, and Article III Section 20 of the Constitution of the State of Florida; and complainants have no adequate remedy at law, and are relievable only in a court of equity and if complainants are not afforded the equitable relief prayed for herein, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under the State Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

36. Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of \$50,000.00; G. Schirmer, Inc. in excess of \$50,000.00; Irving Berlin, Inc. in excess of \$50,000.00; Gene Buck in excess of \$5,000.00; Deems Taylor in excess of \$5,000.00; Oley Speaks in excess of \$5,000.00; William J. Hall in excess of

\$5,000.00; Anne Paul Nevin in excess of \$5,000; Ella Herbert Bartlett in excess of \$5,000.00; and Jane Sousa in excess of \$5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1940, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants [fol. 45] and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and restrain the enforcement of such State Statute, such revenue may be lost to the Society, and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Florida, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions.

Said State Statute and each and every section thereof is unconstitutional and void under the aforesaid Articles and Sections of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution, Treaties of the United States with foreign nations, Presidential Proclamations and the Copyright Act of the State of Florida, and to subject [fol. 46] complainants to an unreasonable search and seizure of their properties, effects, papers and persons.

38. If defendants are not restricted in their threatened and attempted enforcement of such State Statute, complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law, but are relievable only in a court of equity.

Therefore, the complainants pray:

1. That defendants, and each of them, individually and in their respective capacities as officials of the State of Florida charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the abovenamed defendants, and each of them, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said State Statute, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute and each and every part and section thereof, as hereinabove prayed for.

3. That a writ of subpoena may issue to the defendants, requiring them to answer this bill of complaint fully and

truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of complainants' case may require, or to equity may seem just and proper.

Wideman, Wardlaw & Caldwell, Solicitors for Complainants, Office & P. O. Address, 1400 Harvey Bldg., West Palm Beach, Florida. Frank J. Wideman, of Counsel. Gene Buck; J. Field Wardlaw; Manley P. Caldwell, of Counsel.

No. 5242-5210

AGREEMENT

between

J. Fischer & Bro. (Inc.), New York City, party of the first part, and Deems Taylor of New York City party of the second part:

I. J. Fischer & Bro. agree to publish Banks O'Doon — Captain Stratton's Fancy by Deems Taylor.

II. J. Fischer & Bro. agree to defray all expenses made necessary to produce printed copies of the first and all subsequent editions of the musical compositions mentioned in Article I.

III. Deems Taylor, party of the second part, or his assigns to receive in consideration of this agreement, ten per cent (10%) of the marked or retail price on every copy sold.

IV. In said J. Fischer & Bro., its successors or assigns, or legal representatives, shall be vested the exclusive right of copyrighting, publishing and vending the said musical compositions by Deems Taylor, party of the second part, or of making arrangements for so doing with its agents and representatives in all countries.

V. J. Fischer & Bro. agree to make settlement annually in the month of January as of January First.

VI. Copies of musical compositions mentioned in Article I. are to be printed and placed on sale when J. Fischer & Bro. find it convenient so to do.

VII. It is further agreed that said Deems Taylor, party of the second part, shall forthwith sell, assign, transfer and turn over to J. Fischer & Bro., party of the first part, his copyright and all his title and interest in and rights under the same unto the said J. Fischer & Bro., for the consideration aforesaid.

VIII. In said J. Fischer & Bro., party of the first part, its successors or assigns, shall be vested the rights during the full life of copyright to authorize or permit the performance of the musical compositions mentioned in Article I.

IN WITNESS WHEREOF the party of the first part has hereunto affixed its corporate seal and the party of the second part his hand and seal this Sixteenth day of March, 1923.

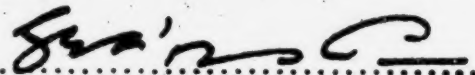
Witness:

J. FISCHER & BRO.

A. Schmitt

as to

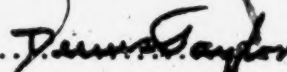
by



H Roth

as to

by

 (L. S.)

36-1940

No.

Rec'd 4/25/35

Exhibit "B"

Agreement Between

Carl Fischer, Inc.

and

American Society

of

Composers, Authors & Publishers

Thirty Rockefeller Plaza

NEW YORK CITY

DATED:

April 12th, 1935.



AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (for brevity called "**Society**"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the **Owner** and/or in the name of the **Society**, or others in whose name the copyright may

same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12*—As per rider below

SIGNED, SEALED AND DELIVERED, on this 12th day of April, 1935.

Owner

Leah Fischer, Inc.

Per Walter Fischer, Pres

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

Society

By *Joseph Young* Secretary

*—12. This rider constitutes #12 of the foregoing contract.

By accepting this contract the Society agrees that all agreements heretofore or hereafter entered into with members for the period beginning January 1st, 1936, are or will be identical in all respects with this agreement.

FOREIGN AGREEMENTS AT THIS DATE IN EFFECT

(See paragraph 11 of the within agreement)

It is distinctly agreed and understood that the powers, rights, authorities and privileges vested in the Society by this instrument, do not include world rights, but are restricted to the United States, ———, Austria, Denmark, France, Belgium, Egypt, Greece, Holland, Japan, Monaco, Portugal, Roumania, Switzerland, Germany, Hungary and Italy.

1—8—36.

It is also understood and agreed that the powers, rights, authorities and privileges vested in the Society by the within instrument shall include Great Britain.

1936-1940

No.

Rec'd 6/25/35

Exhibit "C"

Agreement Between

Gene Buck

and

American Society

of

Composers, Authors & Publishers

Thirty Rockefeller Plaza

NEW YORK CITY

DATED:

June 25th, 1935.

AGREEMENT made between the Undersigned (for brevity called "**Owner**") and the **AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS** (for brevity called "**Society**"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may

stand, as parties plaintiff or defendants in suits or proceedings, or to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made.

5. The Owner hereby makes, constitutes and appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The Owner agrees from time to time to execute, acknowledge and deliver to the Society, such assurances, powers of attorney or other authorizations or instruments as the Society may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the Society shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the Owner within his class may be changed.

8. The Owner agrees that his classification in the Society as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the Society, in case of appeal by him, shall be final, conclusive and binding upon him.

The Society shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the Society's membership a just, fair, equitable and accurate classification.

The Society shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. "Public Performance" Defined. The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. "Musical Works" Defined. The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the Society, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

SIGNED, SEALED AND DELIVERED, on this 26th day of June, 1935.

Owner

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

Society

By

Exhibit "D"

56

Articles of Association

of the

American Society

of

Composers, Authors

and

Publishers



AS IN EFFECT

1937

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Of
AMERICAN SOCIETY of
COMPOSERS, AUTHORS and
PUBLISHERS

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Article I
Objects

SECTION 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers," for the following purposes, to-wit:

- (a) To protect composers, authors and publishers of musical works against piracies of any kind;
- (b) To promote reforms in the law respecting literary property;
- (c) To Procure uniformity and certainty in the law respecting literary property in all countries;
- (d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;
- (e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;
- (f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;
- (g) To grant licenses and collect royalties for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;
- (h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings, involving the right of public performance of any work of any member, or the question of authorship in any work of any member;
- (i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;
- (j) To acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the society.
- (k) To enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society.
- (l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

SECTION 2. The principal office of the Society is to be located in the City of New York.

Article II
Duration

The duration of the Society shall be ninety-nine years.

Article III
Membership

SECTION 1. The membership of this Society shall be divided into five classes, as follows:

Music Publishers

Any person, partnership, firm or corporation regularly engaged for a period of not less than one year in the music publishing business shall be eligible to membership in this class.

Composers and Authors

Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class.

Non-Participating

Each person, partnership, firm or corporation hereafter elected to membership shall be first assigned to this Class, and shall remain therein for a period not exceeding one year from election. At the termination of the said period the Board of Directors shall, by two-thirds vote of those present, determine whether the membership in this class shall continue, and if so for what additional period, or shall be transferred to the appropriate one of the two preceding classes, or be discontinued. No such membership shall, however, be discontinued except after due notice to the member and an opportunity afforded him to appear before the Board of Directors and show cause why the same should not be discontinued.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the two preceding classes of members.

Honorary Membership

Any person, firm or corporation which has rendered to the art or industry of music, or to this Society, a notable or conspicuous service, may be eligible in this Class and elected thereto by unanimous vote of the Board of Directors. All nominations in respect of this class of membership shall, however, be tabled at the meeting first presented, and may not be acted upon until or after the next succeeding meeting.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the first two Classes hereinabove described.

Successors of Deceased Composers and Authors

Any person who has acquired, by will or under any law, the right, title and interest of a deceased composer or author in any musical works, including the right of public performance thereof, may be elected to membership under this Class. Members of this Class shall not have voting power or be eligible to office.

Dues

SECTION 2. The annual dues, payable on the first day of January in each year, shall be as follows:

Music Publishers	\$50.00
Composers and Authors	10.00
Successors to Deceased Composers and Authors	10.00

Upon election to either of the above Classes the member shall pay the pro-rata of annual rate to the first day of the following January, and thereafter at the annual rate of his Class.

Non-Participating	None
Honorary	None

Unless otherwise directed by the Board of Directors, all sums received in payment of dues shall be for the use and benefit of the Relief Fund of the Society.

Upon the default in excess of ninety days in payment of any dues, after notice thereof to the member, the Board of Directors may suspend or expel the delinquent member.

Application for Membership

SECTION 3. Shall be made in writing upon a printed blank form prepared by the Committee on Membership. Every application shall be signed by an individual applicant in person, by a firm, through a co-partner, by an association or corporation through a duly authorized officer. The application shall be submitted to the Membership Committee and shall be accompanied by proof of eligibility to membership.

Intent of Application

SECTION 4. The signing and presentation of such an application to the Membership Committee, shall be deemed and construed to be an agreement on the part of the applicant to fulfill, duly perform, and abide by the Articles of Association, and all requirements herein contained; and to conform to, duly perform and abide by, all by-laws, rules, regulations or resolutions, whether expressed in the Articles of Association or otherwise, which may be in force at the time of such application or may thereafter from time to time be adopted, and to all amendments of and additions to the Articles of Association, by-laws, rules or regulations which after the time of such application may from time to time be adopted.

Election to Membership

SECTION 5. A majority vote of all members of the Board of Directors shall be necessary to elect an applicant to membership.

Obligation of Applicant

SECTION 6. Each member shall, upon election to Active Membership, execute an assignment in such form as the Board of Directors shall approve, vesting in the Society the exclusive right to license the non-dramatic public performance of the members works for the period of any then existing agreement between the Society and its members.

Members' List of Works

SECTION 7. The applicant on being elected to membership shall, upon request, state upon a regular printed form furnished by the Secretary, a brief title, description and the date of copy-

right, of each work published or written by him. Each member shall upon the publication of any work of which he is the author, composer or publisher, furnish to the Secretary, a brief title, description, and the date of copyright thereof.

Transfer of Non-Participating Member

SECTION 8. Upon the transfer of a non-participating member to either "Music Publisher" or "Composers and Authors" Class, and before the transfer shall be deemed as in effect, the member shall execute and deliver to the Society an assignment of non-dramatic public performing rights, in the form submitted by the Society, all of which rights so vested in the Society shall be known as the "performing rights" and are to be held and enjoyed by the Society from the date of election to expiration of any then existing agreement between the Society and its members.

Membership Roll

SECTION 9. It shall be the duty of the Membership Committee to prepare and keep a membership roll or list of members of the Society.

False Representation by Member

SECTION 10. Whenever it shall appear to a majority of the Membership Committee that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement, it shall report the case to the Board of Directors, who by a two-thirds vote of all the members of the Board may expel the member after a trial as in these articles provided.

Failure of Member to Qualify

SECTION 11. If within six weeks after the transfer of a "Non-Participating" member to either "Music Publishers" or "Composers and Authors" Class, the members shall have failed to execute and deliver to the Society the assignment as provided by Section 8 preceding, and to comply with all other rules, regulations and requirements of the Society, the membership shall be discontinued.

Voting

SECTION 12. No co-partnership, firm, association or corporation shall have more than one vote or representative in the Society. In case of a co-partnership, a member thereof, and in case of an association or corporation, an officer thereof, shall be duly designated as its representative. Such designation shall be filed with the Secretary of the Society.

Article IV Management Board of Directors Elections

SECTION 1. The government of the Society shall be vested in, and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. They shall be divided into three divisions of equal number. At the first election hereafter held one division, consisting of four publishers, two authors and two composers, shall be elected for one year; one division similarly constituted for two years and one division similarly constituted for three years; but when the term of each division expires their successors shall be elected by the Board of Directors for three years.

At all times six of the members of the Board shall be composers, six authors and twelve publishers. Any vacancy in the Board shall be filled from the class of members in which the vacancy occurred and shall by nomination of the remaining Board members of such class, be elected by a two thirds vote of the directors present.

Thirteen members shall be necessary to constitute a quorum, and the affirmative vote of two-thirds of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any act or thing within the power of the Board. Any number less than a quorum may meet and adjourn from time to time until a quorum be present.

The Board may determine the rules of its procedure and make any and all regulations necessary for the carrying on of the business of the Board of Directors and the officers, agents and servants of the Society.

Any former President of the American Society of Composers, Authors and Publishers shall be ex-officio member of the Board of Directors, without the right to vote. *Adopted—March 25, 1931.*

Meeting of Board

SECTION 2. The Board shall meet at least once in each month except in the months of July, August and September, and shall hold an annual meeting in the month of January of each year. Notices of regular or special meetings of the Board of Directors shall be given by mail by the Secretary to each director at his last known post office address at least two days previous to the time fixed for the meeting. Special meetings of the Board of Directors may be called by the President or Secretary, and shall be called by either of them on written request of any seven directors.

Report of Board at Meetings

SECTION 3. The Board of Directors shall keep a record of its proceedings which shall be submitted at the annual meeting of the Society, and shall report at such meeting, or at any special meeting of the Society, any business which in its judgment requires the action of the Society.

Article V

Powers of the Board of Directors

Management

SECTION 1. The Board of Directors shall have charge of and supervision over the general management of the business of the Society, and in addition to the powers by these articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done by the Society.

Contracts

SECTION 2. Without prejudice to the general powers conferred by the last preceding section and the other powers conferred by these articles, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To make contracts or authorize contracts to be made by officers of the Society or by any of the committees provided for by these articles; to fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; to collect such royalties; to maintain all legal proceedings necessary to enforce payment of such royalties and compromise claims for damages and penalties for unlawful performances; to distribute among the members the royalties collected in the proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles; to enforce the fulfillment of all contracts, both on the part of the members of the Society and third parties, that may have been made by the Society; to authorize the prosecution and defense of any matter, action or proceeding within the scope of the Society, or affecting its interests or involving the rights of public performance of any work of any member or the question of authorship in any work of any member.

To purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire, at such prices and on such terms and conditions, and for such considerations, as it thinks fit.

To appoint and at its discretion remove or suspend, such assistant secretaries, assistant treasurers, managers, subordinates, assistants, clerks, agents and servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as it may think fit.

To confer by resolution upon any committee or officer of the Society the right to choose, remove or suspend such subordinate officers, agents or servants.

To determine who shall be authorized to sign, on the Society's behalf, receipts, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Society in such manner as it thinks fit, and in particular from time to time to delegate any of the powers of the Board of Directors to any Committees, officers or agents, and to appoint any persons to be the agents of the Society, with such powers (including the power to sub-delegate) and upon such terms as may be thought fit.

To appoint and dissolve all committees; to define, alter and regulate the jurisdiction and exercise original and supervisory jurisdiction over any and all subjects and matters referred to said committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members and punish such as may be found guilty.

The Board of Directors shall have the power to make such regulations and to take such action not inconsistent with the articles of association and the by-laws, as it may deem advisable for the

protection of the property and for the general objects of the Society. It shall adopt a seal of the Society.

The Board of Directors shall have the control over and power of disposition of all funds belonging to the Society. It shall determine the manner and form of their investment and the depositaries of such funds.

Salaries of Directors

SECTION 3. Directors as such shall not receive any salaries for their services except that the sum of \$240 may be appropriated out of the treasury at each meeting of the Board of Directors for distribution as attendance fees among such directors of the 24 members of the Board as shall be present within five minutes after the meeting has been called to order.

In case a director shall be absent from three consecutive meetings of the Board of Directors, unless he shall have been by the President excused from attendance, his office as a Director, and any other office held, shall be declared vacant, and at the next regular meeting of the Board of Directors a successor shall be elected.

SECTION 4. That no resolution increasing salaries or granting emoluments to officers and employees receiving \$5,000.00 yearly or more, or making unusual or extraordinary expenditure or financial commitment may be passed by the Board of Directors until such resolution is first proposed at a regular or special meeting of the Board of Directors and laid upon the table for final action at its next succeeding meeting. Notice of the meeting at which such resolution is to be voted upon granting the same must be given to the members of the Board in writing at least five days in advance.

Adopted—March 28th, 1929.

Vacancy in Board of Directors

SECTION 5. In case of the death, removal or resignation of a director, or of any vacancy in the Board of Directors, such vacancy shall be filled by the election of a director belonging to the same class of directors as the member of the Board whose place is to be filled, for the unexpired term, at the next regular meeting, in the manner provided for the election of directors by the Board of Directors at annual meetings.

Removal or Suspension of Director or Officer

SECTION 6. In case, at any regular or special meeting of the Board of Directors, two-thirds of those present shall be of the opinion that sufficient cause exists for the removal of any director or officer from such office, and that his removal is for the best interest of the Society, a special meeting of the Board of Directors shall be called, upon three days' written notice to each of the directors, specifying the charges against the director or officer against whom such are directed, and a copy of such charges shall be served upon the director or officer so charged, at least three days before such special meeting. In case, at such special meeting, the directors shall after hearing such director or officer, determine by an affirmative vote of two-thirds of all the directors in office, that sufficient cause exists for his removal, and that his removal is for the best interest of the Society, then such person shall immediately cease to be a director or officer as the case may be, and the resulting vacancy shall be filled as provided in Section 5 next above.

The Board of Directors may suspend from office any officer or director against whom charges have been preferred.

Disqualification of Member of Board of Directors

SECTION 7. No member of the Board of Directors shall be disqualified from participating in any meeting, action or proceeding of any kind whatever of said Board of Directors, by reason of being or having been a member of a Standing Committee or Special Committee which has made prior inquiry, examination or investigation of the matter under consideration. Nor shall any member of any Standing or Special Committee be disqualified, by reason of such membership, from acting as a member of the Board of Directors upon any appeal from any decision of such Standing or Special Committee. But no member shall participate in the adjudication of any case in which he is personally interested.

Examination of Member

SECTION 8. The Board of Directors may, by a two-thirds vote of its members present, require that any member of the Society shall submit to the Board of Directors or any Standing or Special Committee, for examination, such portion of his books or papers as are material and relevant to any matter under investigation by said Board of Directors or by any Standing or Special Committee.

Any member who shall refuse or neglect to comply with such requirements, or shall wilfully destroy any such required evidence, or who, being duly summoned, in pursuance of a two-thirds vote of the members of the Board of Directors present, shall refuse or neglect to appear before the Board of Directors or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Society.

Final Decision by Trial

SECTION 9. Any hearing or trial may be adjourned, from time to time, by the Board of Directors in its discretion; but no member thereof, who shall not have been present at every meeting of said Board of Directors at which evidence is taken, or at which an accused member, or a member whose conduct is involved in the hearing or trial, is heard, shall participate in the final decision.

Article VI Officers

SECTION 1. Shall consist of a President, two Vice-Presidents, a Secretary, Assistant Secretary, a Treasurer and an Assistant Treasurer who shall be Directors of the Society, and a Counsel who need not be a member of the Society.

Election of Officers

SECTION 2. The President, the Vice-Presidents, the Secretary, Assistant Secretary, the Treasurer, and Assistant Treasurer, shall be elected annually by the Board of Directors by a two-thirds vote of the entire board, and such officers shall hold the same offices in the Board of Directors. Each officer, excepting the Counsel, shall serve for the term of one year and until the election and qualification of his successor.

Appointment of Counsel

SECTION 3. The Counsel shall be appointed by the Board of Directors for such term as may be decided by the Board.

Vacancy of Office

SECTION 4. In case a vacancy shall occur in the office either of the President, Vice-Presidents, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer, an election shall be held forthwith to fill vacancy for the unexpired term.

Expulsion or Suspension of Officer

SECTION 5. The expulsion or suspension of a member holding any office or position, to which he has been either elected or appointed, shall create a vacancy therein which shall be filled as provided in these articles.

Article VII The President

SECTION 1. The President shall be the chief executive officer of the Society. He shall preside at all meetings of the Board of Directors. He shall have general supervision over the business affairs and property of the Society and over its several officers.

He shall see that all orders and resolutions of the Board of Directors and of the Society are carried into effect and he shall sign all contracts and agreements authorized by the Board of Directors, unless the Board shall otherwise direct. The President shall submit to the Board of Directors, as soon as may be after the close of each fiscal year, and to the members at each annual meeting a complete report of the operations of the Society or the preceding year, and of the state of its affairs, making such recommendations as he thinks proper, and he shall from time to time report to the Board of Directors all matters within his knowledge which the interests of the members may require to be brought to its notice. The President shall be ex-officio a member of all standing committees.

Article VIII The Vice-President

SECTION 1. The Vice-President shall have such powers and perform such duties as the Board of Directors may from time to time prescribe, and perform such other duties as may be prescribed in these by-laws. In case of the absence of the President or his inability to act, the Vice-President shall discharge the duties of the President.

Article IX
The Treasurer

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SECTION 1. The Treasurer shall have charge of the funds, securities, receipts and disbursements of the Society. He shall deposit all moneys and other valuable effects in the name and to the credit of the Society in such depositories as the Board of Directors may from time to time designate. He shall disburse the funds of the Society as may be ordered by the Board, by checks or drafts upon the authorized depositories of the Society, signed by the President or Vice-President and countersigned by himself or an assistant Treasurer. He shall take and preserve proper vouchers for all moneys disbursed. He shall render to the President or to the directors, at the regular meetings of the Board, whenever the President or said Board shall require him to do so, and at every annual meeting of the Society an account of the financial conditions of the Society and of all of his transactions as Treasurer; and as soon as may be after the close of each fiscal year he shall make and submit to the Board of Directors a like report for each fiscal year. He shall keep at the principal office of the Society full and correct books of account of all its business and transactions. He shall give to the Society a bond in such sum as the Board of Directors may from time to time designate conditioned for the faithful performance of the duties of his office and the restoration to the Society at the expiration of the term of his office or in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Society. In the absence of the Treasurer or his inability to act, the Assistant Treasurer shall perform all the duties of the Treasurer. The Treasurer shall pay no bills unless they are properly certified by the officer or committee authorized by the Board of Directors to make the expenditures. The books and accounts of the Society shall be audited monthly in such manner as the Board of Directors may order.

Article X
The Secretary

SECTION 1. The Secretary shall be ex-officio Secretary of the Board of Directors and of all standing committees. He shall record all the votes and proceedings of the meetings of the Society, and of the Board of Directors, and of all committees, in a book or books. He shall record all the votes and proceedings of the meetings of the Society, and when authorized by the Board of Directors he shall affix such seal to any instrument requiring the same. He shall countersign all contracts and agreements signed by the President. The seal of the Society, so affixed, shall always be attested by the signature of the Secretary, or an Assistant Secretary. He shall give notice of all meetings of the Society, and of the Directors, and of all committees and of all calls for assessments to be paid by the members. The Secretary shall also have such other powers and perform such other duties as pertain to his office, or as the Board of Directors may from time to time prescribe. In the absence of the Secretary or his inability to act, the Assistant Secretary shall have all the foregoing duties.

Article XI
The Counsel

The Counsel shall be the legal adviser of the Society, the Board and the various committees. He shall have supervision of all matters involving legal questions, and shall appear for the Society in all actions or proceedings.

Article XII
Absence or Suspension of Officer

In case of the absence of the President, a Vice-President, the Secretary, Assistant Secretary, the Treasurer or Assistant Treasurer, or in case of the suspension of any such officer pending his trial on charges, the Board may delegate his powers and duties to any other officer, or to any Director for the time being.

Article XIII
Order of Business, Directors' Meetings

The order of business at the meetings of the Board shall be as follows:

1. A quorum of thirteen members being present the President shall call the Board to order.
2. The minutes of the last meeting shall be read and considered as approved, if there be no amendments.
3. Reports of officers of the Society.
4. Reports of Committees.

5. Unfinished business.
6. Miscellaneous business.
7. New business.

Article XIV **Standing Committees**

SECTION 1. FINANCE COMMITTEE. There shall be a Finance Committee of three Directors appointed by the President, who shall attend to and supervise all the fiscal operations of the Society to the extent and in the manner directed by the Board, and this or such other committee as may be appointed by the President shall examine all accounts of the Society at the close of each fiscal year and at such other times as may be deemed necessary, and report thereon.

SECTION 2. ADMINISTRATIVE COMMITTEE. The President may also appoint an Administrative Committee from the members, who shall advise with and aid the officers of the Society in all matters concerning its interests and the management of its business and generally perform such duties and exercise such powers as may be prescribed or delegated by the Board of Directors from time to time. This Committee shall consist of such number as the President shall from time to time see fit. (See Section 5.)

SECTION 3. MEMBERSHIP COMMITTEE. The President shall appoint a Membership Committee consisting of five directors who shall pass upon the applications filed with the Committee and shall verify the statements therein contained, and may require of each applicant additional proof of eligibility to membership.

SECTION 4. COMPLAINT COMMITTEE. The Complaint Committee shall consist of three members of the Board appointed by the President.

Any member against whom a complaint is made before this Committee of violation of the Articles of Association, the by-laws or any resolution of the Society, or of the Board of Directors, regulating the conduct of the members, or of any conduct or proceeding inconsistent with the Articles of Association, or of misconduct, fraud, fraudulent acts or acts derogatory to the welfare of or prejudicial to the Society, shall be notified thereof, and if he desires he shall be heard in his defense, and shall be afforded an opportunity to examine all charges, papers and evidence submitted to the Committee, and to make answer thereto. The Committee shall have power to make rules respecting hearings upon such complaints. Proceedings before the Committee shall be confidential, and shall be disclosed only as the Directors order, after the proceedings have been reported to them. Should the circumstances warrant, the complaint shall be referred to the Board of Directors with all evidence taken before the Committee, and the Board, after investigating said charges, shall summon before it the accused member where he shall have an opportunity to be again heard in person before final action in the case, and, if in the opinion of the Board, the charge or charges against said accused member be substantiated, it may by a vote of not less than two-thirds of the entire Board, censure, fine, suspend or expel said member, and the decision of the Board of Directors shall be conclusive and final.

SECTION 5. TERM OF COMMITTEES. All standing committees shall be appointed for a term of one year, and shall remain in office until successors are appointed, or until vacated or voided by the Board of Directors.

Except as to the Administrative Committee the membership of Committees shall consist exclusively of members of the Society.

SECTION 6. CLASSIFICATION COMMITTEE. There shall be two Classification Committees for the allotment of royalties—one for the classification of "Music Publisher" members and one for the classification of "Composer and Author" members. The Classification Committee for the Music Publisher Members shall consist of the publisher members of the Board of Directors, and the Classification Committee for the composer and author of members shall consist of the composer and author members of the Board of Directors.

Each such committee shall meet not less than once in each quarter for the purpose of classifying the members over which it shall have jurisdiction.

It shall be the duty of the Classification Committee to determine the status of each member of the Society with respect to the share of the royalties to which he is entitled in the distribution of royalties directed to be made by the Board of Directors. Such Committees, in fixing the status of a member shall take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifications, standing and service which such member has rendered to the

Society. Such Committee shall, before any distribution of royalties is ordered by the Board, review and revise the classification of the respective members, to the end that the allotment and apportionment of the royalties among the respective members shall be fair, just and equitable to the entire membership.

The Classification Committee shall create several classes, each such class to consist of a group of members having a like status; each member of such group to share equally in the distribution of royalties with the other members of such group. The Committees shall diligently and industriously make due and proper investigation, before each distribution, of the members' standing and advance or reduce a member, as the case may be, from one class to another as the facts and circumstances may warrant, based upon the standards hereinabove set forth.

Protest and Appeal from Classification

Any member, aggrieved by his classification may, after any distribution, file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a sub-committee to investigate such protest.

The Committee shall make its decision within thirty days from the date of filing the protest. The member shall have the right to appeal from such decision to the Board of Directors by filing a notice of appeal in writing with the Secretary of the Society, in which case the protest, with all evidence taken before the Committee shall be referred to the Board of Directors. The Board, after investigating such protest, shall determine the classification of such member by a vote of not less than two-thirds of the directors present. The decision of the Board of Directors shall be conclusive and final. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

Writers' Board of Appeals

In addition to the composer and author Classification Committee, there shall be elected annually from the general membership (publisher members not voting) three committees, each to consist of three members, one committee of popular song composers and authors, one committee of production composers and authors, and one committee of standard composers and authors; these three committees shall constitute a composer and author board of appeals of nine men, and the personnel of said committees shall be made up as follows:

The Secretary of the Society shall, prior to ninety (90) days before the annual meeting, mail to the class AA members in the popular and production groups, a complete alphabetical list of all Class AA composer and author members of each group and to all standard members a complete alphabetical list of all Class AA composer and author members to BB (inclusive) without disclosing the classification of any of those whose names appear on the list; he shall at the same time mail to Class A through B (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class A through B members and each of these respective groups without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to the standard and composer groups from Classes B through C (inclusive), without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to Class CC through 3 (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class CC through 3 (inclusive), members of each of these groups without disclosing the classification of any of the members whose names appear on the list, and mail to the standard group classes DD through 3, a complete alphabetical list of members of these groups without disclosing the classification of any of the members whose names appear on the list.

The members of each group shall vote to elect one member of said group to each of the three committees constituting the composer and author board of appeals; the person receiving the greatest number of votes in his respective group shall be deemed to be elected to said board of appeals; in the event such member is not available for service, then the person in the same group receiving the next greatest number of votes shall automatically take the place of the absentee as an alternate member of the Board of Appeals.

These nine men so elected shall constitute the Board of Appeals, and said Board shall consist of the following three committees taken from the following groups of classification:

1 member on the Popular Writers' Committee from Class AA.

- 1 member on the Popular Writers' Committee from Classes A through B (inclusive).
- 1 member on the Popular Writers' Committee from Classes CC through 3 (inclusive).
- 1 member on the Production Writers' Committee from Class AA.
- 1 member on the Production Writers' Committee from Classes A through B (inclusive).
- 1 member on the Production Writers' Committee from Classes CC through 3 (inclusive).
- 1 member on the Standard Writers' Committee from Classes AA through BB (inclusive).
- 1 member on the Standard Writers' Committee from Classes B through C (inclusive).
- 1 member on the Standard Writers' Committee from Classes DD through 3 (inclusive).

The procedure on appeals shall be as follows:

Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary that he proposes to appeal to the Committee on the Board of Appeals which represents his particular group (popular, production or standard), the said Committee shall entertain his appeal and give him an opportunity to appear in person, if he so desires, or to present his appeal in writing, or both; if the said Committee decides against the member, its decision shall be deemed final; if said Committee decides in favor of the member, its decision shall likewise be deemed final, unless the Classification Committee feels that it is to the interest and welfare of the Society that a further appeal be allowed; in such case, the Classification Committee shall so state in writing, and an appeal may thereupon be taken by the Classification Committee, itself, to the entire Board of Appeals of the composers and authors, consisting of nine members; such appeal may be presented in writing or by oral hearing, or both; the decision of such Board of Appeals shall be considered final.

Members shall be given not less than five (5) days notice of the date when their appeal will be heard.

Appeals shall be heard in regular order, and the Board of Appeals shall meet at least once every three months, and until all appeals have been heard.

A majority vote of the Board of Appeals shall rule.

If a member of the Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Classification Committee and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

The Classification Committee shall delegate one of its members to be at the disposal of the said Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Board of Appeals whenever so requested; the counting and tally of ballots of election shall be under the direction and supervision of the General Manager and President of the Society; the election of the members of the Committees and Board of Appeals of the Composers and Authors, shall take place at least one month prior to the annual meeting of the Society, and the results thereof shall be announced at the annual meeting of the Society, each year, except that the first election shall take place not more than two (2) weeks after the passing of this amendment by the general body.

The decisions of the Board of Appeals, with respect to the proper classification of members, shall not be retroactive.

The Board of Directors of the Society shall make the rules of procedure by which the Board of Appeals shall be governed.

If any member of the Board of Appeals is advanced out of the class and group from which he is elected, then he shall immediately be replaced by his alternate in that particular class and group.

No member elected to serve on the Board of Directors of the Society shall be eligible to serve on the Board of Appeals.

The Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers, under Article XIV, Section 6, and at all times take into consideration all data, etc., which from time to time are used by the Classification Committee in arriving at the just classification of members.

The Board of Directors shall, at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Board of Appeals, at such times as they are required to hold meetings.

The foregoing provisions shall apply only to Author and Composer members of the Society, and not to Publisher members.

This amendment is to take effect immediately.

In addition to the Classification Committee for the music publisher members, there shall be elected annually from the general membership (composer and author members not voting) two separate committees of three members each, to be known respectively as the

- (1) "Popular Publishers' Board of Appeals"
- (2) "Standard Publishers' Board of Appeals"

and the personnel of each of said committee shall be selected as follows:

(1) The Secretary of the Society shall, prior to ninety (90) days before the Annual Meeting, mail to each and every publisher-member a complete alphabetical list of all publisher-members of the Society, without disclosing the classification of any of such members; he shall also at the same time send to each publisher-member a ballot.

(2) The publisher-member shall, prior to the Annual Meeting, fill out said ballot, each "Popular" publisher-member voting for three members of the "Popular Publishers' Board of Appeals"; and each "Standard" publisher-member voting for three members of the "Standard Publishers' Board of Appeals".

Each such ballot shall be returned by mail to the Society and shall be opened and inspected jointly by the President and General Manager of the Society who shall make a record of each vote. The three persons receiving the highest number of votes in each class shall be deemed elected the members of the indicated ("Popular" or "Standard") Publishers' Board of Appeals and the three persons in each class receiving the second highest number of votes shall be deemed to be alternates to serve in place of those elected in any case and under all circumstances and with the full powers of the duly elected incumbent in the event of his inability or refusal for any reason to serve.

(3) Appeals of "Popular" publisher-members may be presented to and considered by the "Popular Publishers' Board of Appeals" only, and appeals of "Standard" publisher-members may be presented to and considered by the "Standard Publishers' Board of Appeals" only.

(4) The Publishers' Board of Appeals shall meet only in the City of New York, and their respective procedure on appeals presented to them shall be as follows:

(a) Any publisher-member who is dissatisfied with the decision of the Publishers' Classification Committee, may give notice in writing to the Secretary that he proposes to appeal to the appropriate Publishers' Board of Appeals; the said Publishers' Board of Appeals shall entertain his appeal and give appellant an opportunity to appear in person, if he so desires; or to present his appeal in writing, or both; on such appeal a sub-committee appointed by the Publishers' Classification Committee may also appear and give evidence justifying its classification of said publisher member; if the said Publishers' Board of Appeals decides against the publisher-member, its decision shall be deemed final.

(b) If the said Publisher's Board of Appeals decides that the publisher-member has been improperly classified, said Board shall bring up such question for review before the Board of Directors as a whole, within thirty (30) days after the filing of the decision of the Board of Appeals and the Board of Directors shall proceed with the question in the manner provided for by these Articles of Association, and the decision of the Board of Directors shall be final.

(c) No member of the Publishers' Classification Committee nor of the Board of Directors shall be eligible to serve as a member of either Publishers' Board of Appeals, nor shall there be eligible to membership on said Board, more than one individual representative of a firm of publishers; such member is to be designated by the firm or corporation publisher-member and his name placed on file with the Secretary of the Society, prior to the annual vote; the expression—"Firm of Publishers" shall include not only publisher-members, corporate, partnership or individual, but all firms, whether corporate, partnership or individual allied with or subsidiary to such publisher-member. If a member of either Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Publishers' Classification Committee, and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

(d) A majority of the Board of Appeals shall rule; publisher-members shall be given not less than ten (10) days' notice of the date when their appeal will be heard; appeals shall be heard in regular order.

(e) The Publishers' Classification Committee shall delegate at least one of its members to be at the disposal of the said Publishers' Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Publishers' Board of Appeals whenever so requested.

(f) The Publishers' Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers under Article XIV, Section 6, and must at all times take into consideration all data, etc., which from time to time are used by the Publishers' Classification Committee in arriving at the just classification of members.

(g) The Board of Directors shall at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Publishers' Board of Appeals at such times as they are required to hold hearings.

(h) The General Manager shall, within ten (10) days after the adoption of this amendment send to each publisher-member a form upon which the said member shall be required to indicate into which class of membership, "Popular" or "Standard" he desires to be registered. Upon registration in such class a member may vote as provided in Paragraph 2 above only for members of the Publishers' Board Appeals of the Class indicated.

Any appeal brought by such member shall be considered only by the Board of Appeals functioning in respect to that class. However, a member desiring to change his class may do so upon request in writing addressed to the Secretary of the Society and approval of such request by the Board of Directors.

(i) The foregoing provisions shall apply only to publisher-members, and not to author and composer members of the Society.

This amendment to take effect immediately.

SECTION 7. RELIEF COMMITTEE. There shall be a Relief Committee of three Directors, appointed by the President, consisting of one publisher, one author and one composer, who shall investigate requests or applications for relief on behalf of a sick, infirm, needy or deserving member or his widow, infant children or indigent parent. Upon the recommendation of such Committee the Board may direct the payment of such sum or sums as in its judgment will satisfy the immediate necessities of such person or persons, and to make advances, from any royalties thereafter to accrue to the member, such advances to be repaid to the Society by deducting the whole or any part thereof from any subsequent distributions awarded to such member.

The Board of Directors shall annually devote a part of the proceeds derived from its operations to the purpose of giving financial aid to members of the Society, their widows, infant children or indigent parents. The giving of such assistance is optional and shall only be granted in cases of urgent necessity, and the Society does not vouchsafe to its members the right to receive assistance. Any moneys paid out on account of relief must always be entered in the books of the Society with a statement of the actual purpose for which they were disbursed, and not merely under the head of "Relief."

Article XV

Apportionment of Royalties

SECTION 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half ($\frac{1}{2}$) thereof to be distributed among the "Music Publisher" members, and one-half ($\frac{1}{2}$) among the "Composer and Author" members respectively.

Reserve Fund

SECTION 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a portion of the royalties as and when collected be placed in such reserve fund.

Unclaimed Royalties

SECTION 3. Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society.

**General Powers and Duties of Committees
Quorum of Committees**

SECTION 1. A majority of each committee shall constitute a quorum thereof.

Meetings of Committees

SECTION 2. Each Committee, unless otherwise voted by the Committee, shall meet at least monthly upon a date to be fixed by the Committee, except during the months of July, August and September. The Secretary shall send notices of each meeting to the members thereof at least three days in advance of the meeting.

Absence of Member of Committee

SECTION 3. If any member of any Committee is absent from two successive meetings without an excuse presented to the Committee, his place may be declared vacant by the President.

Minutes of Committee

SECTION 4. The standing committees shall keep regular minutes of their transactions and cause them to be recorded in a book kept in the office of the Society for that purpose, and report the same to the Board of Directors at its regular meetings.

Article XVII

Special Committee

Whenever any twenty-five members of the Society shall certify to the Board of Directors that they desire the Society to prosecute any matter within the scope of the Society, the President shall appoint a special committee to investigate the matter and report to the Board of Directors with its opinion thereon whether it is advantageous and for the best interest of the Society to undertake the prosecution of such matter. The Board of Directors shall carefully consider such report and a two-thirds vote of all the directors shall determine whether or not such prosecution shall be undertaken.

Article XVIII

General Meetings of the Society

SECTION 1. The General Annual Meeting shall be held each year during the month of March. An additional General Membership Meeting shall be held in the month of October of each year. Special meetings may be called at any time by the Board of Directors.

Business Transacted at General Meetings

SECTION 2. No business shall be submitted to the General Annual Meeting, unless it has been brought to the knowledge of the Board of Directors at least eight days in advance. The General Annual Meeting shall, however, be entitled in any event to lay aside any such business as it may consider inopportune.

Motion or Resolution in Writing

SECTION 3. Every motion or resolution which shall be made or offered at any meeting of the Society shall, at the request of the Secretary, be reduced to writing and furnished to the Secretary before the question shall be put.

Article XIX

Notices

SECTION 1. Whenever notice is required to be given to any member, such notice shall not be required to be given by personal service, but such notice shall be deemed to have been given from and at the time when said notice in writing shall have been deposited in the Post Office, or in any regular United States mailing box in the City of New York, enclosed in a post-paid wrapper, addressed to the member at his last known place of residence, as the same shall appear upon the books of the Society, or if such address shall not appear upon the books of the Society, then to such address as may appear in any directory of the municipality in which he may reside or do business.

Article XX

Expulsion and Termination of Rights of Membership Suspension for Cause

SECTION 1. Any member who is expelled by the Board of Directors, or who is dropped for the non-payment of dues, fines or assessments, shall thereupon lose and forfeit any and all interest, right or claim in, to or under the Society, the property thereof, and the dues and assessments paid thereto. Upon expulsion, death, bankruptcy, insolvency or other severance of membership in or connection with the Society, all rights and interest of whatsoever character, sort or kind, to, of, in or concerning the Society by virtue of such membership, shall instantly cease and be of no further force and effect. Expulsion shall not relieve any member from his obligations to the Society up to the date of such expulsion.

Posthumous Membership

SECTION 2. On the death of any member his rights in the Society and membership shall cease and neither his rights nor his membership nor any right therein shall at any time be, by voluntary assignment, operation of law, legal proceedings or otherwise, vested in any other person whomsoever; provided, however,

That in the sole discretion of the Board of Directors the heir, heirs, or next of kin of a deceased member may be awarded a share in royalty distributions not exceeding that which would, in the judgment of the proper Classification Committee, have been awarded to the deceased member had he been living at the time of such royalty distribution.

Bankruptcy of Member

SECTION 3. The Board of Directors shall have the right to suspend payments of royalties to any member in case of the filing of a petition in bankruptcy by or against him, and/or the adjudication of such member a bankrupt, or the execution by such member of an assignment for the benefit of creditors, or the taking advantage by him of the insolvency laws of any State, Territory or Country, or the appointment of a receiver, trustee or liquidator of the assets and property of the member, or the voluntary or involuntary dissolution of a member.

The representative of any member of "Music Publishers" class who shall be a member of the Board of Directors shall immediately upon the happening of any such contingencies be dropped from the Board of Directors.

The royalties, or the right to participate in the royalties, and the rights of the members in the Society, shall not be sold or otherwise disposed of by any member, and shall not be the subject of sale or other disposition by voluntary action, operation of law, legal proceedings or otherwise, and no member shall sell, otherwise dispose of, hypothecate or create a lien upon any royalties accruing, or that may thereafter accrue to him, by virtue of his membership, or any of the rights, privileges, benefits, royalties or emoluments to which he may be entitled by virtue of his membership.

Article XXI

Amendments

These Articles may be amended by a vote of two-thirds of the members present at any meeting of the Society held for the purpose of voting on such amendment.

[FLORIDA STATUTE]

SENATE BILL NO. 679

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors, or assigns, to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself of its members or other interested parties for any use, or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors proprietors, managers, owners or representatives thereof, who render or cause to be rendered

ately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or in-

instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein-declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus; or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than \$50.00 or more than \$9,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or re-

representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of \$100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void; such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

THIRTY ROCKEFELLER PLAZA
NEW YORK CITY

January 15, 1936

Isle of Dreams Broadcasting Corporation
Radio Station W.I.O.D.
Miami Beach, Florida

Gentlemen:

It is mutually agreed that the certain license agreement between us, dated Sept. 20, 1932, effective September 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

and Article 8 is amended by striking out therefrom subdivision (a) and (b).

Very truly yours,

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

By..HERMAN.GREENBERG.....

ACCEPTED:

ISLE OF DREAMS BROADCASTING CORPORATION

By...P. READER.....

Title Treasurer

Dated.....

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (hereinafter styled "SOCIETY"), and ISLE OF DREAMS BROADCASTING CORPORATION, (hereinafter styled "LICENSEE"), as follows:

1. SOCIETY grants to LICENSEE, its successors and assigns, and LICENSEE accepts for a period of three (3) years from September 1st, 1932, a license to publicly perform by broadcasting from Radio Station W. I. O. D. located at Miami Beach, Florida non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a place or from a source which SOCIETY does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

- (a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 3 hereof shall be adjusted.
- (b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, SOCIETY shall refund to LICENSEE pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of ONE THOUSAND AND no/00 Dollars (\$1000.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

- (a) For the first year of the term hereof, a sum equal to three percent (3%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities, and,
- (b) For the second year of the term hereof, a sum equal to four percent (4%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities; and,
- (c) For the third year of the term hereof, a sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities.
- (d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to LICENSEE for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by LICENSEE).

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of account.

ing as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to indemnify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands, or suits that may be made or brought against the LICENSEE with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in SOCIETY'S repertory heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall forthwith give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall co-operate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against LICENSEE on account of the rendition of any musical composition contained in the SOCIETY'S repertory but NOT heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

IN WITNESS WHEREOF, this agreement has been duly subscribed by SOCIETY and LICENSEE this 20th day of September, 1932.



AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By **WM. E. ARNAUD**

ISLE OF DREAMS BROADCASTING
CORPORATION

Licensee.

By **JESSE H. JAY**
President.

Exhibit "G"

85
FLA-1-42
M.P.-B

(THEATRES)

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and MARIANNA THEATRES, INC. (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing November 23rd, 1936 a license to publicly perform at the Ritz Theatre in Panama City, Florida, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Licensee warrants and represents to Society that the statements made in the application dated 11-25-36 for this license are true and correct, upon which warranty and representation the license fee herein is fixed. 810 seats.

5. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "5", there shall be made to the Licensee a pro rata refund of any unearned license fees.

6. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

7. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

8. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

9. Licensee agrees to pay Society for the license herein the sum of One Hundred and Twenty-One Dollars and Fifty Cents (\$121.50) annually, payable semi-annually in advance in installments of Sixty Dollars and Seventy-Five Cents (\$60.75) each.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 28th day of November, 1936.

In Triplicate.



AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD.....
Agent and Attorney in Fact

MARIANNA THEATRES, INC.

By A. E. ADAMS.....
V. Pres.

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MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and THIRTY ONE WEST ADAMS STREET CORPORATION (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing December 1, 1936 a license to publicly perform at Carling Hotel, Jacksonville, Florida, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of Two Hundred Forty and no/100 Dollars (\$240.00) annually, payable in quarterly installments of \$60.00 each, in advance.

This contract includes musical performances other than by means of master controlled radio receiving sets in hotel guest rooms for which a separate license is issued.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 8th day of January, 1937.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD
Agent and Attorney in Fact
THE CARLING HOTEL

By CHAS. B. GRINER, Mgr.



[fol. 87] *Duly sworn to by Gene Buck. Jurat omitted in printing.*

[fol. 87½] [File endorsement omitted]

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—Filed February 7,
1938

Having considered the Bill of Complaint and the affidavits of Gene Buck, Walter S. Fischer, Gustave Schirmer, Saul [fol. 89] H. Bornstein, Deems Taylor, Anne Paul Nevin and Ella Herbert Bartlett, all duly verified and filed in the above entitled suit, and the motion of the plaintiffs for a temporary injunction herein, and their request that the same shall be heard and determined by three Judges of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and being fully advised of the law and the facts, and it appearing therefrom to be a proper case therefor, now therefore, it is

Ordered, and this does order:

1. Plaintiffs' application for a temporary injunction filed herein on February 7, 1938, be and the same is hereby set for hearing before the Court at the Courtroom thereof of the Federal Building at New Orleans, La., at the hour of 10 o'clock in the morning of March 3, 1938;

2. That the Honorable Rufus E. Foster, a Judge of the Circuit Court of Appeals for the Fifth Circuit, and the Honorable Louie W. Strum, one of the Judges of the above entitled Court, be and they are hereby called to my assistance to hear and determine said application for temporary injunction at said time and place; and

3. That written notice of the time and place of the hearing on said application for temporary injunction be given to the Honorable Fred Cone, the Governor of the State of Florida; the Honorable Cary D. Landis, Attorney General of the State of Florida, and to such other persons as may be defendants in the suit, at least five (5) days before the date of said hearing.

Done, February 7, 1938.

A. V. Long, United States District Judge, Northern
District of Florida.

[fol. 94] **Affidavits in Support of Motion for Temporary Injunction**—Filed February 7, 1938

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GENE BUCK

Gene Buck, being duly sworn, deposes and says:

I am an author and have been such for over twenty years.

I am a member, director and President of the American [fol. 95] Society of Composers, Authors and Publishers, (hereinafter referred to as the "Society"), and am familiar with the facts set forth in the bill of complaint herein.

I have a wide and extensive familiarity with the music business as well as the theatrical business.

My own experience goes back to the days of Florenz Ziegfeld. I wrote over twenty "Follies" for him as well as sixteen "Midnight Follies" produced by Ziegfeld, and some other plays. I wrote the lyrics as well as a substantial part of the book for his "Follies". I wrote the lyrics for a great many musical compositions that were published in the past twenty years, some of which had a wide vogue and celebrity:

I am personally acquainted with practically all of the important members of both professions and know their problems and struggles for the past quarter of a century.

In 1930, I was elected President of the Society.

This motion is made on behalf of the complainants herein and others similarly situated, for a temporary injunction to restrain the defendants herein from enforcing Senate Bill No. 679, enacted by the Legislature of Florida, and signed by the Governor of that State on June 9th, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute").

The reason that a temporary injunction is asked for is that the enforcement of this Statute, if not restrained by this Court, will result in such terrific hardship to myself, to the other complainants herein and to others similarly situated, that no possible redress can be had.

This State Statute is aimed at, and actually will succeed in destroying, the rights of complainants and others simi-

[fol. 96] larly situated, in their copyrighted musical compositions, and will enable the users of such compositions in the State of Florida to make free use of these works, without compensation.

In order to avoid unnecessary repetition, and in the interest of brevity, I shall not repeat the allegations already made in the bill of complaint, and I make the bill of complaint herein a part of this affidavit, and ask that it be considered by the Court with the same force and effect as if the facts therein stated were repeated by me in this affidavit.

I shall confine myself in this affidavit to amplifying the allegations of facts set forth in the bill of complaint, particularly with a view to setting forth the facts which compel the complainants and others similarly situated to combine for the purpose of protecting their copyrights in musical compositions against infringement by means of unauthorized public performance for profit, and to license the use for public performance for profit of the catalogues of complainants and others similarly situated, and I also desire to show by this affidavit why the requirements of the Statute would impose a hardship upon complainants and others similarly situated, as well as upon honest users of copyrights who desire to respect our rights, and the necessity for granting licenses to users at a single fee fixed and determined by the Society, acting on behalf of all its members and members of affiliated societies, in negotiations [fol. 97] with users or their respective trade associations. Such licenses will be referred to hereinafter as "blanket licenses." Such licenses enable users to have available at all times a reservoir of musical compositions on which they may draw instantaneously and at will without the necessity of endless negotiations with individual copyright proprietors.

The Society is an unincorporated non-profit association organized in 1914 for the purpose of protecting composers, authors and publishers of musical works against infringement of their copyrighted works, and to grant licenses for the public performance of such works for profit.

Prior to the organization of the Society, composers and authors received no compensation whatsoever from the performance of their works in night clubs, cabarets, dance halls, hotels, motion picture theatres and other places of

public amusement and entertainment; the proprietors of these places, (hereinafter referred to as "users") profited from the performance of the works of these composers and authors and disregarded the United States Copyright Law, which, since 1897, granted protection to authors and composers against such unauthorized performances; such performances, especially with the advent of radio, seriously diminished the earning power of composers and authors by diminishing the number of persons attending the performance of their works at legitimate theatres, diminishing the sales of sheet music and diminishing the sales of phonograph records and music rolls, from which sources alone composers and authors received their income; the users of music combined into powerful trade associations to deprive composers and authors of any royalties from performance of their works in places of public amusement and entertainment [fol. 98] ment; a single composer or author is unable to protect his rights because of the tremendous number of places where his works are performed simultaneously throughout the United States, which performances are fleeting, momentary and fugitive and cannot be detected unless a paid investigator is employed to ascertain the infringements occurring at such places; the Society has protected composers, authors and publishers of musical works against such infringement, and has supplied a means through which users of copyrighted works may readily secure a license and thus perform lawfully any of a vast number of works required for the purpose of presenting a pleasing, attractive and diversified program; but for the existence of the Society the users would refuse to pay any royalty whatsoever to composers and authors for the use of their works for the private profit of such users; the royalties charged by the Society for the use of the works of 45,000 composers and authors scattered throughout the world is nominal in comparison with the income derived by such users from the exploitation of such musical works.

• The Right of Public Performance of Copyrighted Works Licensed by the Society Is Granted by the Congress Pursuant to the Constitution of the United States

Article 1, Section 8 of the Constitution gives Congress the exclusive power

"To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The Copyright Law of 1897 granted to authors and composers the exclusive right to perform their copyrighted musical compositions publicly for profit.

[fol. 99] The Society Acts as a Clearing House to Serve the Convenience of Users, as Well as to Protect Composers, Authors and Publishers.

A user cannot lawfully perform a copyrighted musical composition for profit without the consent of the copyright owner.

The successful presentation of a musical program at a dance hall, cabaret, night club, motion picture theatre, hotel, restaurant or radio broadcasting station requires from 15 to 104 musical compositions in a single hour or a single evening. Each hour or each evening requires not only different musical numbers but different types of music. (Musical compositions are divided roughly into popular works, production works and standard works.)

Since copyrights obtained in foreign countries are respected in the United States under reciprocal treaties with such countries, the user of music may not play the works of composers and authors residing abroad without their consent.

There are upwards of 30,000 establishments daily and hourly performing the copyrighted works of both American and foreign composers and authors.

In view of the obvious need of users of music to be able to play a given number at a moment's notice without negotiating for the consent of a particular composer or author, the users require this reservoir of music to avoid individual bargaining, and the creator of music cannot bargain for the licensing of the performance of an individual number unless he is able to offer to the user a license to perform a sufficiently large, varied and diverse program in order to [fol. 100] enable the user to present to his public a composite program suiting the taste and fancy of the particular listeners.

The works of a writer of standard music have no value for the purpose of public performance unless they can be interspersed with popular numbers and production numbers.

If a radio station limited its broadcasts to the compositions of a particular composer or to a particular class of musical compositions that composer or that class of compositions would soon find that the public would absolutely refuse to listen.

Nothing on earth can change the human desire for variety in music as well as in other fields of entertainment.

The Society performs a very useful and necessary function as a clearing house through which users of copyrighted music may secure a license to use such music without the necessity of seeking out each individual copyright owner or the owner of the right to perform publicly for profit. Such owner may be a composer, author or publisher, or some third party. It is impossible to secure in advance the consent of all the copyright owners whose works are performed in these places of public entertainment.

Prior to 1914, the copyrighted works of composers and authors were being performed for profit by users located throughout the United States, including the State of Florida, without any payment whatsoever to the writer.

The writer because of his very modest means, was unable, acting individually, to secure redress against unlawful performance of his works although such performances were in direct competition with the legitimate stage performances [fol. 101] from which, (together with royalties from sales of sheet music and mechanical reproduction), the writers derived their livelihood.

These illegal performances were multiplied in every part of the United States, including each of the Counties in the State of Florida. The illegality of such performances was extremely difficult to establish and prove, unless a trustworthy and responsible person, located in the vicinage where such illegal performances took place, was on hand to witness and hear same and to notify the infringer of his unlawful act, coupled with a demand to desist from such further unlawful performances.

Prior to the organization of the Society, piracy was the accepted custom. No one paid for the non-dramatic public performance of copyrighted works for profit.

As against the meager resources of the individual writers and publishers, unorganized as they were, the users were organized into trade associations whose chief objects were to resist demands of writers and publishers of music that their performing rights be recognized and respected, and

to defend by the paid counsel of each such association those of their members who might be sued for piracy.

Under the pressure of these economic conditions, a group of composers which included Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, myself and others, with a very few publishers, organized on the 13th day of February, 1914, the Society, principally for the protection of writers and publishers of musical works [fol. 102] against the infringement of their performing rights in their copyrighted works in all countries of the world, and for the granting of licenses for and on behalf of its members to perform for profit such works and to collect royalties for such licenses; the membership of the Society was and is limited exclusively to and is composed entirely of composers, authors and publishers of musical works; the royalties collected for and on behalf of the members by the Society from licenses to play the works of its members are distributed among its members exclusively in accordance with a scheme of allotment of royalties provided for in its Articles of Association, a copy of which is annexed to the bill of complaint.

A part of the royalties accruing to the member of the Society collected from the users is, pursuant to the Articles of Association, devoted to the support and maintenance of the widows and orphans of deceased members and of members that have become indigent, infirm, aged and decrepit.

Since the formation of the Society, no author or composer of music has been buried in a pauper's grave or permitted to famish, or his family to famish, which conditions existed prior to the formation of the Society while the users were capitalizing and using his works for their unjust enrichment and advantage.

The Society continually extends financial aid to those who have written or are dependent upon the writers of successful musical works, in the payment of life insurance premiums, the saving of homes from foreclosure of mortgages, the payment of hospital bills, the succour of the living and the burial of the dead. None of these people ever received [fol. 103] or ever would have received a dollar from the users and commercial broadcasters who prospered commercially because of the use of the works resulting from the creative genius of these people.

Economic Conditions Necessitating the Organization of the Society

The Society was organized under the necessities of the situation arising out of the new style of entertainment offered to the public in restaurants, hotels, inns, and other public resorts. To induce the public to patronize these places and to acquaint the public with the fact that a musical program was the distinctive feature and main attraction of the establishment, these entertainments were widely advertised under the names of "cabarets", "tea dansantes", "after-theatre revues", "midnight revues", "dinner dancing", "dinner and music" and similar slogans. While no special admission fee was charged for these entertainments, it was expected that those who patronized them would purchase food and drink. In some establishments "convert" or other charges were added to the patron's check. The patrons paid for the entertainment by a direct or indirect charge, and the entertainment was given for direct or indirect profit.

The cabaret or revue entertainment consisted of the rendition of music and the singing of songs and dancing to the accompaniment of music. In some of the establishments, the performances were given in make-up and costume, and on a platform or stage. The entertainment was advertised in the daily newspapers in the same manner, mode and means as regular legitimate attractions playing [fol. 104] at first-class theatres, which paid the authors and composers a license fee or royalty for the use of their works.

In its most developed form, the cabaret or revue is a regular show, with appropriate intermissions indicated by a suspension of action instead of lowering a curtain.

Cabaret, motion picture and vaudeville shows and revues were presented in nearly every city in the United States, the dominant, distinctive, and principal features of each such entertainment being the vocal and instrumental numbers of the current grand and comic operas, musical plays, as well as standard and popular compositions.

A leading and attractive feature of the larger hotels in the United States was the orchestra and the musical and dance program.

Dance halls which relied entirely for their operations upon music sprang up like mushrooms in every part of the United States. A direct admission fee was charged at the

door of these dance halls; in some instances there was a hatcheck, in others, a specific charge of so much per dance.

Motion pictures were coming into prominence as a form of entertainment, and theatres devoted exclusively to the showing of motion pictures were erected in every city and town and village in the United States, and, of course, music and musical attractions played a very important part in such class of entertainment.

All these places of public entertainment were dependent almost entirely for their success upon the songs and instrumental numbers of the composers, authors and publishers. But no proprietor expressed a willingness to, nor did he pay a fee, royalty, or other compensation to the owner of [fol. 105] the works. On the contrary, proprietors of these resorts helped themselves to the current works without the leave or license of the copyright proprietors, completely ignored them and their statutory rights in their property, upon the ground that musical performances given by them were not for profit, because they were given without direct admission fee, or that music was merely incidental to the operation of the premises, and for that reason the performances were not subject to the control of the copyright proprietor.

The writers and publishers realized that their works were exploited by others and were used for profit and not only that, but in some instances the performances were in direct competition with those given by legitimate theatrical managers who did pay performing royalties to the writers whose works were used. The creators of these works justly felt that they were entitled to participate and share in a modest way in the profits and revenues made possible by the exploitation of their works.

A single writer or publisher was and is helpless in dealing with these infringers for the following reasons:

As an individual, he could not protect his rights as against the tremendous commercial enterprises which would appropriate it to their use without any compensation to him.

The several groups of users of music were organized in trade associations and were prepared to use the resources of their organizations in resisting the effort of any individual composer to enforce his performing rights, while the composers and publishers were mostly men of humble and moderate income, who were not able, singly, to bear the expense of ascertaining and investigating the piracies and [fol. 106] of protracted and numerous litigations.

Moreover, the use made of copyrighted music in these places was in the form of musical programs in which the works of a number of composers were combined.

The performances, as a rule, were fleeting, and unless the infringement was detected and established the moment it occurred, proof thereof was well-nigh impossible.

A single entertainment amounted to a composite infringement of a number of compositions of several composers. In the course of a year, the proprietor of a single establishment would violate the rights of hundreds of composers and copyright proprietors, and each of these was a victim of a number of piracies.

Piracies were committed in numerous establishments and in various parts of the United States, and the expense of locating and securing the evidence of the piracies was prohibitive for the individual writer or publisher. Separate actions for each act of piracy would involve a multiplicity of litigations.

The piratical practice, having in this way a collective effect, collective and protective action by the writers and publishers was natural and necessary.

There was this further element to urge organized action. The practice grew in leaps and bounds. The resorts where musical works were performed extended to every city and to every part of every city. Motion picture theatres added musical programs to their performances, and their number grew so fast that in a few years the industry connected with motion picture shows became one of the largest industries in the United States. At the present time there are over [fol. 107] 16,000 such theatres, attended by more than 80,000,000 patrons each week.

In many motion picture theatres vaudeville has been displaced by a form of musical and dramatico-musical presentation. The stage performance often takes an entire hour and such stage performance is advertised in many instances as the main attraction at such motion picture theatres. Indeed, many patrons of motion picture theatres attend merely for the musical presentation.

The box office receipts of some of these theatres have averaged over \$100,000 for a single week.

In addition, many regular theatres have been converted into so-called cabarets or night clubs, giving regular ambitious stage performances in the same manner as legitimate theatres.

In view of the multitude of places where his rights were being infringed (including places located in each of the Counties in the State of Washington), it was impossible for an individual composer to ascertain and prosecute even a small number of the piracies.

Without the collective action of at least a certain number of writers and copyright proprietors, the performing rights secured by the copyright law remained without effective protection. It became evident that unless composers and copyright proprietors organized in sufficient number to provide mutual aid and the necessary funds for the protection of their rights against an army of pirates, most of whom were banded together in trade associations for the express [fol. 108] purpose of making piracy a safe practice, all the rights granted by the law to copyright proprietors would be nullified.

Furthermore, an organization of the composers, authors and copyright proprietors was necessary to meet the demands of users, who, in compliance with law, desired to obtain licenses to use copyrighted songs and music and were willing to pay compensation for the use of such works.

No place of public amusement could carry on its musical entertainment by confining its program exclusively to the works of a single composer. Programs had to be attractive, pleasing, international and diversified, and had to present the current songs and instrumental numbers that were in vogue or were the reigning "hits" of the day—those that had received popular acclaim, or appealed to the whims, taste and fancy of their patrons.

A dance hall required an average of 81 tunes for its nightly program, and the other places of public entertainment from 15 to 104 separate and distinct numbers of different composers. In other words, the program, to be entertaining, had to be composite.

The organization was necessary because of the hardship and inconvenience imposed upon users and commercial broadcasters in securing the consent of individual writers and proprietors whose works they wished to include in their programs. Writers and publishers were scattered throughout the United States and in foreign countries. Required to deal with them as individuals, there was no possibility of finding them and procuring licenses, without difficulties, which, in the great majority of cases, were insuperable. Under these circumstances, copyright infringement and its

[fol. 109] consequences were unavoidable. It was obviously to the advantage of the users located in various parts of the United States, including users located in the State of Florida, to deal with an association of writers and copyright owners who, unless thus organized, could not be found.

The value, both to the author, composer and publisher, as well as to the users and commercial broadcasters, of such an organization was proven by the experience abroad. Similar societies had been organized and were functioning in France, England, Italy, Austria and Germany.

In France, in January 1851, there was organized a society known as "Societe des Auteurs, Compositeurs et Editeurs de Musiques", the purpose of which was to protect composers, authors, and publishers of musical works against piracies of any kind, and to grant licenses and collect royalties for the public performance of the works of its members. That society conducted its operations and activities to the mutual advantage of all parties interested, and said French society served as the model for the Society.

Under the scheme of organization of the Society, the publisher did not and does not now enjoy any right in the work superior to that of the composer or author thereof, insofar as the Society is concerned. The writer and the publisher shared and now share equally in the royalties or license fees derived from the exploitation of the performing rights.

At the outset the users of copyrighted music refused to recognize the rights of public performance, and the national, state and city associations representing the users of copyrighted music informed the Society that they would resist [fol. 110] to the utmost any attempt to prevent their members from using copyrighted songs belonging to members of the Society, and that they would under no circumstances permit any of their members to take out licenses from the Society or to treat with it in any way.

Hotels

The owners of hotels consistently refused to pay for the use of music until the United States Supreme Court decided that the performance of copyrighted music in hotels was a performance for profit, since the music was used as an inducement to bring patrons into the hotel (Herbert v. Shanley, (1917) 242 U. S. 591).

In that case, Victor Herbert and his collaborators were the composers and owners of a comic opera called "Sweet-

hearts", then given by Klaw & Erlanger, theatrical managers, at the New Amsterdam Theatre, in New York City, under Herbert's license. The Shanley Co., operated a cabaret wherein they caused to be sung the leading song features of such opera accompanied by an orchestra. There was no charge at the door, but patrons were obliged to pay a so-called cover charge, which was fixed at \$2 per head. As a matter of fact, this cabaret was competing with the licensed legitimate stage production.

Justice Holmes, declaring such performance an infringement of the copyright, said, at page 594:

"If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly [fol. 111] that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. * * * If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."

Many of these hotels have been in competition with legitimate productions. Their advertisements disclose the fact that they do not stress the quality or merit of food or services or the desirability of their hostelry, but rather call to the attention of the public their floor shows, orchestras and other forms of musical entertainment. The interest of the public is sought to be stimulated and attracted by these facilities.

Motion Picture Exhibitors

After the decision in *Herbert v. Shanley*, in 1917, while the hotelmen made some effort to work out an agreement with the Society, the motion picture theatre owners, through their trade associations, refused to concede that the decision was applicable to the playing of copyrighted music in motion picture theatres. They declared that no direct admission fee

was charged for hearing the music and that the music was incidental to the entertainment.

It was therefore necessary to test out the issue as to the applicability of the copyright law to that newer type of public amusement. The Motion Picture Theatre Owners [fol. 112], of America challenged the rights of the society and a test suit was brought by Raymond Hubell (a member of the Society) against the Royal Pastime Amusement Co. a motion picture exhibitor) for the playing of Mr. Hubbell's song, "Poor Butterfly", which was a feature and "hit" of the then current New York Hippodrome production, from which Mr. Hubbell had been deriving a performing royalty.

The action was defended by the local trade association. The case was decided in favor of the plaintiff, in a decision rendered May 31, 1917 (242 Fed. 1002), the court holding that the copyright law applied to motion picture theatres.

Although the motion picture exhibitors presented elaborate stage performances, which often took as much as an hour and more, and were advertised as the main attraction, they refused to pay anything to the authors.

The Motion Picture Exhibitors League of America went so far as to adopt, in April 1917, a resolution which read:

"That the organization undertake legal defense of any exhibitor against whom action is brought by the American Society of Composers, Authors, and Publishers, to apply to nonmembers as well as members."

The Motion Picture Exhibitors League of America's activities did not deal with the matter of procuring funds to combat the Society only, but brought an action at its own cost and expense and with counsel supplied by it, in the name of one of its members, the 174th Street & St. Nicholas Amusement Company v. George Maxwell, as president of the Society and its Directors (169 N. Y. Supp. 895) to restrain the Society from conducting its operations, from act- [fol. 113] ing in concert to demand fees as a condition precedent to the paying of musical compositions, from using the funds of the defendant Society in furtherance of its objects, and enjoining its directors and officers from meeting, with any purpose to act in combination or concert, upon the ground that the defendants were a monopoly in restraint of trade. In this action it failed, the court saying:

"* * * The fact that the music of the authors who are members of the association is popular and in demand pre-

sents just so much more reason why it should be protected, and its unauthorized use at public entertainment given for profit prevented. Practically the exhibitors of moving pictures seek to obtain by injunction the right to publicly perform copyrighted musical compositions for profit, without a consent of the holder of copyright, and without compensation to him."

Radio Broadcasters

With the development of broadcasting in 1922, there was a new invasion of the rights of the authors. Radio took the most popular musical hits of the day, and by constant grinding and repetition of songs, acted as a veritable inferno, greatly shortening the life of a song and ruining the sale of sheet music and phonograph records, from which the authors had previously derived the major part of their royalties. In spite of this great injury to the author's works, the radio broadcasting stations refused to make any payment to authors. The National Association of Broadcasters issued the following proclamation:

"To publishers of dance, jazz, blue, and popular music: The members of this association maintain that they will not pay for licenses from any copyright owner or recognize the right to collect any tax until the law plainly states that such payment must be legally collected."

[fol. 114]. The challenge of the broadcasters was accepted by the Society and a suit was brought in behalf of a member, M. Witmark & Sons, against Bamberger & Co., in the United States District Court of New Jersey, to restrain a department store dealing in radio products from broadcasting the plaintiff's copyrighted music. Judge Lynch in that case held that radio broadcasting was a public performance for profit (291 Fed. 776).

Notwithstanding the decision in the Witmark case, the broadcasters refused to respect the rights of authors. Thereupon, Jerome H. Remick & Co. brought a suit in the District Court of Ohio against the American Automobile Accessories Co. (owned by the Crosley Manufacturing Co., which was engaged in selling radio accessories and equipment) for infringement of the musical composition by radio broadcasting. Although the district court dismissed the suit, the rights of the copyright owners were upheld by the Circuit

Court of Appeals in an opinion by Judge Mack in 1925 (5 Fed. [2d] 411). Certiorari was denied by the Supreme Court.

Broadcasters and hotel owners continued to challenge the rights of copyright owners to be paid for the broadcasting of their works as late as 1931, when the United States Supreme Court held that a hotel which picked up a program of copyrighted music emanating from an unlicensed broadcasting station must pay the copyright owner (*Buck v. Jewell-LaSalle*, 283 U. S. 191).

The Statute Complained of is Part of a Deliberate Program on the Part of Users to Place Composers at the Mercy of Users

[fol. 115]. William S. Hedges, chairman of the executive committee of the National Association of Broadcasters, in the hearings before the Congress on H. R. 12549 (Jan. 28, 1931), at page 44, declared:

"It is unnecessary to direct attention to the fact that music is, in the main, the raw material from which broadcast programs are constructed and is, therefore, almost the lifeblood of the broadcasting business."

The National Association of Broadcasters has laid out a program with which to combat the association organized for the protection of song writers. In respect of this, the NAB Bulletin, February 18, 1936, entitled "Report on Copyright", states (p. 19):

"3. The only occasions in the past on which ASCAP has seemed really willing to negotiate have been when by reason of developments on other fronts the broadcasting industry seemed on its way toward achieving a measure of progress toward bargaining equality.

"A corollary conclusion is that, to have any hope of success, the broadcasting industry must concentrate on removing so far as possible the obstacles which have been enumerated under the previous subheading. Such a program includes litigation, legislation, the establishment of an independent source of music supply, doing away with the discriminatory ASCAP contracts, eliminating the objectionable features from network-affiliate contracts, and any and all steps and proceedings necessary to these ends."

The implication of this extraordinary statement is that by means other than ordinary negotiation, it has forced the Society to accept terms and fees of licenses dictated by the NAB and its members. Those methods were threats of numerous and costly lawsuits, hostile legislation and various campaigns to harass, vex, and annoy the Society, and [fol. 116] to put it to large expense to aggressively resist the attempts to destroy it.

This policy was not new, novel, or original with NAB. The motion picture theatre owners had pursued a similar policy.

Separate suits in State courts were instituted by members of each association for the purpose of preventing the Society from carrying on its activities in each such respective State. These suits were sponsored by the respective associations. Complaints were filed with the Federal Trade Commission and with the Department of Justice of the United States.

The Society, having been thoroughly investigated by these two agencies of the Federal Government, was given a clean bill of health.

The Federal Trade Commission, in dismissing the charges on January 2, 1923, said:

"The chief reason for this conclusion may be stated as the fact that the making of a claim for royalties, apparently in good faith, cannot be said to constitute 'an unfair method of competition in commerce'."

The Department of Justice, in dismissing the charges on August 6, 1926, said:

"A thorough and comprehensive investigation was made of the organization and operations of that society. Several special agents of the Bureau of Investigation were engaged in that investigation and it was conducted almost continuously for a period of about 2 years. The Society has been advised that the Department saw no reason for proceeding against it under the antitrust laws on account of its operations in collecting licenses for the public performances of copyrighted music from the owners of motion picture houses, of hotels, of dance halls and of similar places where copyrighted music is publicly performed for profit.

[fol. 117] "It was found that the rights conferred under the Copyright Act by Congress on the owners of copyrighted music had repeatedly been held by the Federal courts to be violated by the unlicensed performance of such music, in amusement where the performance of the music constituted at least part of the public entertainment from which the owner of the place of amusement derived profit through the charges made to his patrons."

In respect of the New York State court suit, that court, in dismissing the action, held (169 N. Y. Supp. 895):

"The fact that the music of the authors who are members of the association is popular and in demand presents just so much more reason why it should be protected, and its unauthorized use at public entertainment given for profit prevented. Practically the exhibitors of moving pictures seek to obtain by injunction the right to publicly perform copyrighted musical compositions for profit, without a consent of the holder of copyright, and without compensation to him."

The broadcaster, having secured a license upon terms entirely satisfactory to him, saw no reason for prosecuting such suit any further.

A flood of bills was introduced into the Congress for the purpose of exempting broadcasters, exhibitors, and hotel owners from any liability in respect of the public performances of musical works for profit. Extensive and exhaustive hearings were held thereon and all failed of passage.

The Society, having submitted to the exactions of these users and acceded to their demands, these activities of the users both in respect of litigation and legislation, thereupon ceased until shortly prior to the expiration of licenses between users and the Society.

Beginning with 1934, threats were made by the responsible officials of the NAB (representing practically all of the radio broadcasting stations in the United States, including the broadcasting stations in the State of Washington enumerated in the complaint herein), that unless the Society renewed its existing licenses upon the same terms and conditions, the Society would be subjected to a barrage of hostile legislation and institution of suits and the filing of complaints with the Department of Justice.

About the same time, a three-point program of activity was begun by the NAB which included litigation against the Society and the securing of copyright modification of the composers' and authors' rights. The membership was asked to contribute 10 per cent of the payments made to the Society as a war chest, with the slogan "10 per cent now or 300 per cent in 1935."

To carry out the program:

"Large contributions were sought from and made by independent stations as well as by the networks and Levy, for the carrying forward of the program of which this was an integral part" (p. 6 NAB Special Report, Feb. 18, 1936).

The Society, having refused to submit to these species of extortion, the following steps were taken:

The broadcasters, through one of their members, instituted a suit for the dissolution of the Society (Pennsylvania Broadcasting Co. v. Buck), now pending in the United States District Court for the Southern District of New York.

A suit was commenced by the United States Government, in the United States District Court for the Southern District of New York, pending at the present time.

[fol. 119] A suit was instituted in 1935 by the State of Washington, in the Superior Court, Thurston County, for a dissolution of the Society, in which a receiver was appointed. The result of such suit was that during the pendency of that litigation, the Society received absolutely no revenue from the use of the works of its members throughout that entire State. The suit was subsequently dismissed on the merits, on July 6, 1936, by decree, which is annexed hereto as Exhibit "I".

Prior to the dismissal of the Washington State suit, copies of the papers in that suit were reprinted by the NAB and sent to each member. In respect of this activity, the Cincinnati Bill Board (Feb. 15, 1936) observes:

"It is believed that this move on the part of James W. Baldwin, managing director of the NAB, is an effort to help along similar moves in States that have laws like those of Washington, or those that desire to seek such legislation.

"Portland, Oreg., February 8.—Group of broadcasters here were told by a Washington authority that certain laws of the State are similar to those of Washington and suitable for a monopoly suit against A. S. C. A. P."

The pendency of the Government suit has been used as a justification and defense for piracy by many users performing the compositions of the Society's members.

Certain members of the NAB holding licenses from the Society have furnished inaccurate and misleading returns, resulting in very substantial losses to the members of the Society.. The shortage ranges from \$2,400 to \$40,000 in respect of certain stations.

Foreign-government-controlled and noncommercial radio stations pay composers more for music than do American [fol. 120] commercially operated stations.

In the report of Judge Parker, a Commissioner appointed by the Canadian Inquiries Act, dated the 29th day of October, 1935, he says (p. 35):

"Taking the number of radio receiving sets in the United States and the gross revenue derived by the American Society of Composers, Authors, and Publishers from the American broadcasting stations, the rate per receiving set works out at about 9½ cents.

"The Canadian Performing Right Society, Ltd., in arriving at the basic fee of 10 cents per receiving set in Canada had regard to the rates charged in other countries, giving the following examples:

	Cents per Set
"Denmark	13
Great Britain	7¾
Australia	30
United States	9½
Germany	9
Austria	10½
Norway	16
Czechoslovakia	10
France	5
Finland	5
Italy	13"

It must be borne in mind, however, that in none of these countries are the stations operated commercially; that is, time on the air is not sold to advertisers. The sole revenue derived by the governments is from the licensee fees col-

lected from receiving sets, out of which a proportion thereof is paid to the Performing Right Society operating in that particular country.

It must further be borne in mind that in none of these countries do the radio stations serve such coverage areas, embracing as many families, owning as many radio sets, and such potential listening audiences as American stations enjoy. This is illustrated by an advertisement appearing in *Variety*, February 19, 1936:

"As the Most Powerful Station in Philadelphia and as the Oldest.

"WCAU was the first Philadelphia station established exclusively for radio advertising. As the only Philadelphia unit of the Columbia Broadcasting System WCAU serves a primary coverage area in which there are 1,429,124 families, of which 1,312,011, or 91.7 percent, own radio sets. A potential listening audience of 4,592,038. WCAU, 50,000 watts, Philadelphia, Pa.

Robert A. Street, Commercial Manager."

This station for the year 1934 paid the society \$15,981.

Users Have Always Struggled to Secure Performing Rights Free and This State Statute is Part of the Program in this Direction.

The National Association of Broadcasters chooses to appear in the light of an apparent champion of the composer, and in its bulletin (Feb. 18, 1936, p. 22) says the following:

"In pursuing this or any other programs, it cannot be made too clear that it is in the best interest not only of the broadcasting industry but of the public that every encouragement be given to writers and composers of music, both for the sake of the advancement of their art as such and in order that a constant supply of music of the best quality be made available to listeners. To accomplish this, as I know is realized by the entire industry, no scheme will succeed that attempts to do anything else than compensate them, and compensate them generously, for their work and their talent."

[fol. 122] Put to the acid test a few illustrations will suffice to show that the professed generosity has been wholly in favor of the broadcaster.

Every step taken up to the time of the issuance of this bulletin was to secure from songwriters the free use of their compositions for public performance for profit, either by voluntary licenses or by compulsion under acts of Congress or by judicial determination.

The National Association of Broadcasters, in a circular letter dated December 31, 1923, and signed by Raymond Walker, manager of the Bureau of Music Release, solicited compositions for broadcasting purposes free of charge over the stations of the association upon the condition that—

“When a number has been accepted by us for release, the copyright owner furnishes us with 100 dance orchestrations and the same amount of professional or song copies which we distribute to our members who in turn place them in the hands of artists who broadcast at their stations. The copyright owner also signs contracts allowing us a fair percentage of the mechanical royalties.”

This practice with respect to nonmembers of any performing rights organization still prevails.

Station WLS of Chicago, Ill., a commercially operated station having 50,000 watts, affiliated with the NBC Blue network, as late as March 1935 solicited licenses from composers who were requested to sign a regular blank form of release prepared by the station as follows:

“We hereby grant you a license to perform for radio broadcasting and to radio broadcast (including television) such performances over any stations you may desire, by wire lines or by means of any mechanical device, any or all [fol. 123] compositions published by us and/or bearing our name as copyright proprietor and/or any or all compositions for which we now control the performing rights or for which we may acquire performing rights during the period of this agreement.

“Neither you nor any of the radio stations broadcasting such compositions pursuant hereto shall be required to pay license fees for such performances and broadcasts. You shall have unlimited discretion as to the time, place, and frequency of performance and broadcast.”

June 28, 1935, station WNEW, Newark, N. J., 2,500 watt station, commercially operated in New York City, advertising itself as the large regional station in the metropoli-

tan trading area, solicited permission under blank form of license, which reads:

"It is hereby agreed that I grant you a license to perform for radio broadcasting over station WNEW and to radio broadcast or perform over the above-mentioned and other stations owned or controlled by or affiliated with you, all music of my composition (except such as hereinafter described), granting you the rights under the period of this agreement.

"Neither you nor any associated stations broadcasting such music shall be required to pay a license fee for such performance or broadcast.

"This agreement shall include all music of my composition except such as may be reserved by me by means of formal written notice delivered in your hands."

On September 4, 1935, WOR, Bamberger Broadcasting Service, Inc., Newark, N. J., a commercially operated station affiliated with Mutual Broadcasting System and stations WGN Chicago, WLW Cincinnati, and CKLW Windsor-Detroit, solicited permission to broadcast numbers on its blank form releases, which read as follows:

"We hereby grant you a license to perform for radio broadcasting and to radio broadcast (including television) [fol. 124] such performances over any stations you may desire, by wire lines or by means of any mechanical device, any or all compositions published by us and/or bearing our name as copyright proprietor and/or any or all compositions for which we now control the performing rights or for which we may acquire performing rights during the period of this agreement.

"Neither you nor any of the radio stations broadcasting such compositions pursuant hereto shall be required to pay license fees for such performances and broadcasts. You shall have unlimited discretion as to the time, place, and frequency of performance and broadcast.

"The duration of this license to perform shall be for a period of 1 year from the date hereof, and thereafter it shall continue in effect until 30 days after the giving of written notice to you by mail directed to you at your Newark address.

"You are also authorized to make such arrangements and transcriptions of said works as you may find necessary or

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desirable for broadcast use, and to have and permanently retain as your property all materials thereof which you have deemed it expedient to make or duplicate for the purpose of facilitating such performance."

October 14, 1935, the National Broadcasting Co. requested Mrs. Justin Elie, the widow of a composer, to grant it a license to perform her husband's work upon these conditions:

"I do further license you to perform and to license others to perform said compositions and to radio broadcast (including television) said performance over any stations you may desire wherever located without the payment of any performing right or broadcasting fees whatever."

Upon the trial of the United States v. The Society, (S. D. N. Y., 1935, case unfinished) one Thomas Belviso (a Government witness), the program director of the National Broadcasting Co., testified as follows (p. 376-378):

[fol. 125] "And doesn't that mean licenses from individual publishers or composers?"

"A. Yes, we have some of those, too.

"Q. And you do from time to time take licenses from persons, firms, and corporations who are not members of the society?"

"A. True.

"Q. And as to those, you call them by the name of private licenses?"

"A. That is right.

"Q. Now, does the National Broadcasting Co. pay for those private licenses?"

"A. No, we do not.

"Q. These you get for nothing?"

"A. That is right."

He further testified that in respect of certain Argentine numbers which he required for his program, he just took them and did not pay for the right to broadcast them (p. 378):

William Benning (A Government witness), program director of WTMJ, of Milwaukee, Wis., 5,000-watt station, commercially operated, testified that he required nonmembers of any performing rights society to sign substantially

similar releases as those hereinabove described; that there were quite a few of such releases and under them the composers received not a penny for the broadcasting of their works (pp. 681, 682, 683).

The society stands between the exploiter and the victim. If the society can be destroyed by litigation or legislation the organized users will easily secure licenses upon starvation terms.

In *Performing Rights Society of Great Britain* in its case against Thompson (34 T. L. R. 351) the Court says:

[fol. 126] "Now, the position of the plaintiff company appears to be this: It was formed in the year 1914 and the circumstances under which it was formed apparently were these: It was found that it was difficult for authors to recover the proper remuneration for their performing right in respect of infringements that might take place all over the country. Such author would have to, first of all, ascertain whether his work was performed or not, and then would have to enter into the necessary correspondence with regard to it, and if the correspondence was insufficient to protect him, to undertake the necessary litigation, and, on the other hand, if persons desired to be honest and pay for the property that they were using, it was not very easy for them to ascertain in all cases where the copyright was or who they had to ask for permission to perform.

"These difficulties, as I understand, are difficulties that have existed for a number of years not only in this country but in other countries, and in other countries societies have been formed in which music composers and music publishers have associated together in an association which protects for the authors and composers who form the members of the association their respective rights of copyright, and, following upon the lines of the large and successful French society with similar objects, in 1914, this society was formed and it now comprises amongst its members a number of the leading publishers of popular music and leading composers of popular music * * * There is no doubt it comprises a large number of persons who in every respect represent the musical world so far as it can be judged by the composition and publishing of popular music. * * * One has very little sympathy when a thief complains of the organization of the police force and one would not listen with

sympathy to a complaint by a burglar that the constable who arrested him was receiving larger remuneration than he ought to have or that he was going to receive a bonus for his success in detecting the crime. I am not suggesting, of course, in this case, that the defendant was in the position of a thief or burglar, but at the same time one has to remember that there are a great many persons honorable in every transaction of life who do have very loose notions as to the honesty of dealing with other persons' property in such matters as copyright * * * I certainly think that [fol. 127] it is satisfactory to find that this society, which, after all, in the present case is merely engaged in securing the fruits of their labors to the musical composers, has a legal object and cannot be defeated in what one cannot help feeling is a position of public interest."

The Select Committee of the House of Commons, Great Britain, which investigated the performance of copyrighted musical works in 1930 reported:

"Nor do they wish to place any obstacles in the way of composers forming an association for the purposes of protecting and enforcing their performing rights. Such an association is undoubtedly a convenience and almost a necessity, both to the composers, music publishers, and the user of music who would be considerably embarrassed if he had to deal separately with each piece of music performed. In fact it may be said to be the only practicable way in which the composer can collect his fees for performing rights in any adequate manner. If such an association is to function effectively, it must obtain as nearly a super-monopoly of the monopolies conferred upon composers by the copyright acts."

In the report of Judge Parker, a commissioner appointed by the Canadian Inquiries Act, March 22, 1935, he makes the following statement (p. 7):

"* * * Then came the radio and the sound film, and the employment of many thousands of people in the production of music for broadcasting and the showing of films.

"With such developments it became impossible for any individual author or composer to be able to ascertain the extent to which the composition which was the subject of his copyright was being produced in one or other of the many forms of musical production which had come into

existence. This made it necessary for authors and composers to have some kind of organization to protect their interest. Such an organization had been existent in France for many years, but the need for such organizations was emphasized by the new conditions which had arisen.

[fol. 128] "It is a central bureau established for the convenience of the copyright owners on the one hand, and the music users on the other hand, and it was conceded by all those appearing at the inquiry that such a bureau is necessary to protect the performing rights of authors, composers, and publishers, and is a convenience to the users of music in obtaining the performing rights."

Composers Now Look to the Royalties Derived from Licenses to Broadcasters, Exhibitors and Hotels as Their Principal Source of Income from Their Works

Judge Parker of the Canadian Commission found (p. 9):

"Copyright in a musical work is divided into three separate property rights. They are, first, the right of publication in printed form; second, the right of reproduction on mechanical contrivances; and third, the right of performance. The Copyright Act of Canada sets out specifically what it meant by performing right. In a nontechnical sense, and with particular reference to music it may be described as the exclusive right to perform a musical work in public.

"Until recent years, authors, composers, and publishers looked mainly to the first property right mentioned above in the form of sales of sheet music for their revenue. With the popularization of records, the second property right came into prominence, and although this provided a new source of revenue to the owner of the copyright, there was a decrease in the sales of sheet music, with a consequent loss of revenue from that source. It is to be observed that these first two rights which were looked to for revenue are not performing rights.

"In the last few years the development of radio has caused a decrease in the sale of sheet music and records. The broadcasting stations have undoubtedly familiarized the public with many pieces of music, but the total result has been a reduction in revenue for the authors, composers, and publishers from the sale of sheet music and records.

[fol. 129] The societies which control the copyright, including the performing right, have looked to the fees from licenses conferring the performing right upon music users to compensate them in part for the losses suffered from the decrease of sales of sheet music and records. This consideration has been one of the factors determining the tariff of fees for performing rights."

The piano, the phonograph, victrola, and player piano have been relegated to the "horse and buggy" era. The sales of sheet music, phonograph records, and piano rolls have been reduced by 80 per cent by radio competition.

The Widespread Use of Radio Has Seriously Diminished the Income of Authors and Composers from Other Sources

Simultaneously with the growth of radio and its use of music came a diminution of income to the authors and composers.

The income from sales of sheet music and books of music graphically illustrates the decline in income since the advent of radio. The United States Government reported the following income from those sources:

1927	\$17,146,715
1929	16,537,747
1931	12,203,657
1933	2,340,723

The income from mechanical royalties for six representative publishers in the field of popular music graphically illustrates the decline in income since the advent of radio. The publishers reported the following income from that source;

[fol. 130]

1924	\$638,380.56
1925	714,724.80
1926	936,224.72
1927	852,588.82
1928	723,689.72
1929	562,267.20
1930	284,139.81
1931	173,668.57
1932	79,337.53
1933	51,770.88

A similar loss of mechanical royalties was suffered in the field of standard music where the income of six representative publishers from 1924-34 inclusive was as follows:

1924	\$27,701.01
1925	19,012.77
1926	13,767.90
1927	11,771.85
1928	15,300.12
1929	13,560.84
1930	7,724.12
1931	5,390.67
1932	79,337.53
1933	3,345.88

Statistics reveal the decline of the legitimate show. The Motion Picture Herald compiles statistics which show that whereas in 1920 there were 68 musical productions, in 1934 there were only 24. In 1920 there were 26 successful musical "hit shows," and in 1934 about 8. A compilation of the total number of musical productions and musical hits from the Motion Picture Herald of November 17, 1934, is as follows:

Year	Total musical productions	Musical-hit shows
1920-21	68	26
1921-22	54	20
1922-23	54	15
1923-24	50	24
1924-25	59	30
1925-26	62	27
1926-27	70	29
1927-28	69	27
1928-29	63	25
1929-30	62	21
1930-31	45	13
1931-32	46	9
1932-33	32	9
1933-34	24	8

[fol. 131] The public looks to the radio for its amusement, recreation, and entertainment. The public pays for that

entertainment by way of added charge to the merchandise purchased by it and advertised through radio media.

What Was Spent for Radio in 1936

(Compiled by Radio Today, January 1937)

Sale of time by broadcasters	\$114,000,000
Talent costs	36,000,000
Electricity, batteries, etc., to operate 33,000,000 receivers	150,000,000
8,000,000 radio sets sold	440,000,000
46,000,000 replacement tubes	31,000,000
Radio parts, supplies, etc.	45,000,000
Servicing radio sets	75,000,000
U. S. Public paid for radios in 1936	\$891,000,000

This \$891,000,000 could never have been realized but for the raw material furnished to the radio industry by the world's composers. Eighty per cent of broadcast periods are devoted to music. The broadcasting industry paid \$3,200,000 for the year 1936 to the American Society and its affiliates, representing 44,000 composers.

On January 1, 1937, there were 33,000,000 radio sets in use in the United States. The radio audience is 80,000,000. The radio broadcasters in the State of Florida, as well as in other States of the Union, are making a profit of 350% on their investment. This is borne out by a statement made by George H. Payne, one of the Federal Communications Commissioners, as reported in "The New York Times" of April 25, 1937 and reprinted in "Broadcasting" of May 1, 1937, the spokesman for the radio broadcasters of the country. The article is as follows:

[fol. 132] "Payne Reported Seeing '350%' Profit for Radio

"In another speech on the subject of broadcasting, FCC Telegraph Commissioner George H. Payne is reported in the *New York Times* of April 25 as stating that the industry will probably show a profit of '350 per cent' this year. He addressed the conference of District 2 of the American College Publicity Association at Adelphi College, Garden City, L. I. Mr. Payne again was quoted as asserting that there was \$40,000,000 invested in the broadcasting business and that its gross revenue last year was \$107,000,000.

"Although expressing the belief that there was a great opportunity for college men and women in broadcasting, Mr. Payne is quoted in the *Times* as saying:

"Unless broadcasting companies begin to pay attention to public criticism, they face a rough road ahead. In every other country of the world they do not permit advertising and they send cultural education over the air. In this country we allow the broadest liberty. Some broadcasts are pumping into private homes material about nostrums, foods that have not been demonstrated as beneficial and certain medicines that the people should never be urged to buy."

Salaries Paid to Radio Artists

The radio broadcasters have always objected to paying anything to the 44,000 song writers throughout the world whose music makes the operation of their stations commercially profitable. But there seems to be no limit to the salaries paid to those who merely perform these songs. The following 15 radio artists received more per week from radio than all the song writers combined (Heinl Radio Letter, Jan. 4, 1935):

[fol. 133]	Preradio	Postradio
Joe Penner	\$850	\$7,500
Ben Bernie, orchestra	2,000	7,500
Fred Waring, orchestra	3,500	10,000
Eddie Cantor	7,500	12,000
Jack Benny	2,000	4,500
Phil Baker	2,000	5,000
Burns and Allen	850	5,000
Kate Smith	850	6,500
Morton Downey	1,500	4,500
Block and Sully	750	2,500
Jane Froman	400	2,000
James Melton	300	1,500
Jack Pearl	2,000	8,500
Ed Wynn	5,000	10,000
Dave Rubino	400	2,500

In 1936, \$36,000,000 was spent for talent by sponsors presenting commercial programs over broadcasting stations in the United States. Artists' bureaus of radio stations, including those located in the State of Florida, receive sub-

stantial fees for booking these features. An idea as to how the income from this source has been increasing is that in 1927 \$1,000,000 was spent for radio talent. In 1928 and 1929 \$5,000,000 was spent. In the short space of 8 years the expenditures in this direction have increased 36 times.

Advertising agencies for presenting radio programs on behalf of commercial sponsors for 1934 received \$9,000,000 as commissions. The Agency's participation is merely booking the sponsor on the radio stations and then directing or participating in the staging of the show for the sponsor. In every instance the raw material for each program which the agency helps to bring together is the music. For this the 45,000 authors and composers of the Society whose music was used, received \$2,058,392.93.

Says Justice Owen in the report of the Australian Royal Commission (1933):

[fol 134] "That broadcasting generally has affected the sales of sheet music and records is undoubted. It supplies attractive entertainment and variety easily and cheaply within and without the home, with the result that the public look to broadcasting for pleasure and recreation rather than to sheet music and records."

The talking motion picture, the radio musical-entertainment broadcast, the hotel and night club floor shows have been the legitimate theatres' most aggressive competitor. So much so that legitimate musical attractions presented in each year on the New York stage have been reduced by 70 per cent, owing to this keen competition.

Says the Motion Picture Herald (Nov. 17, 1934):

"The so-called 'legitimate' production long since gave up the ghost as a serious competitor to the motion picture, and, regardless of its progress henceforth, it is generally considered unlikely that the stage ever will be resurrected in a form that will cause the motion-picture exhibitor any concern."

Subsequent events will bear out this prophecy.

Constant Radio Repetition Shortens the Life of a Song

The constant broadcasting of a particular composition shortens its popularity and prevents the composer from securing such returns from other sources as were formerly possible. An outstanding hit is often played from 10 to 12

times a night. The life of a song is shortened by too frequent repetitions. Two months is fairly close to the limit for the life of a song in the popular class today.

Radio broadcasters themselves realize the destructive effect of too constant repetition. Mr. Roy F. Durstine, representing one of the largest advertising agencies in the United States, writing in *Broadcasting*, January 15, 1935, listed as a suggestion to commercial broadcasters:

[fol. 135] "Keep popular songs from committing suicide by restricting them from being played every night in the week on every station, if not on every program."

For the year 1934 over 85 songs were played over the air 10,000 times, or more, each, over stations affiliated with the National Broadcasting Co. and the Columbia Broadcasting System.

Sound motion pictures caused a reduction in the employment of musicians. According to the American Federation of Musicians, there were employed 16,000 less musicians in motion picture theatre orchestras in 1932 than in 1925.

In practically every home the radio has become the common form of entertainment. The piano and the player piano, as well as the victrola, are no longer the principal instrumentalities by which the people in the homes are entertained. The record of the sale of pianos discloses as follows:

In 1923 the sale of pianos amounted to \$104,000,000; in 1925, \$93,670,000, and subsequently fell off, until in 1931 it was \$12,000,000; and the latest figures available, to wit, 1933, disclose that the sales amounted to \$7,000,000.

The sales of phonographs in 1925 amounted to \$22,600,000, and reached a peak in 1927 of \$46,000,000. In 1931, it was \$4,869,000. Today no figures are available, because of the combination of phonograph and radio in one set.

In some radio stations electrical transcriptions are used as a means of providing entertainment either in the form of "spot" broadcasting, sponsored programs, or sustaining programs.

[fol. 136] The owners of broadcasting stations derive income, benefits, and advantages from several sources, directly and indirectly. The direct sources of income are (a) moneys paid to the stations by advertisers for time on the air; (b) moneys received by stations from the operation of artists bureaus; (c) miscellaneous.

Sales of Time on the Air

In 1933 the income of all radio broadcasting stations for the sale of time on the air was \$45,000,000; in 1934 it was \$73,807,000, in 1935, \$88,000,000; in 1936 it was \$114,000,000.

The 10 stations located in the State of Florida received a net revenue from the sale of time on the air to advertisers, alone, in 1935, in the sum of \$580,000.

During that year, they paid to the Society, under license agreements for the right to perform publicly for profit the copyrighted musical compositions of the Society and its members and the 44,000 members of the affiliated societies, the sum of \$21,044.93.

59.5%, or a total of 250,600 families in the State of Florida, out of the entire number of families in that State, totaling 421,000, own radio receiving sets. These figures appear in the May 1, 1937 issue of the magazine "Broadcasting", and were compiled by the joint committee on radio research of a number of radio broadcasting associations, including the NAB.

[fol. 137]

Artists Bureau

In addition to the receipts from sponsored programs many broadcasting stations operate artists bureaus from which they derive substantial income.

These artists bureaus arrange for and provide talent for radio programs. In many instances the artists used in commercial programs are individuals who have been presented on sustaining programs.

The artists bureau makes a commission ranging from 10 to 25 per cent for all engagements filled by its artists, which commission is paid by the artists. It likewise makes agreements with these artists under which their services are made available not only for radio programs but also for concerts, private parties, motion pictures, the legitimate stage, social functions, tours of vaudeville theatres and other types of amusement places, and in its agreements provide for commissions on each contract made on behalf of said artists. The Columbia Broadcasting System concert bureau handles 124 artists, and National Broadcasting Company 86. Among their artists are Fritz Kreisler, Kirsten Flagstad, Nelson Eddy, Nathan Milstein.

Miscellaneous

Another source of income is the charge made by some radio stations to those who visit the studios and/or its tech-

nical rooms. The outstanding example of such a charge is that made by N. B. C., which charges 40 cents per person for a guided tour through its New York City broadcasting station and studios. In 1935 approximately 20,000 persons were taken on such tours. (See Zits, Oct. 31, 1936.)

[fol. 138] Another source of income has been the N. B. C. Thesaurus Library established by the National Broadcasting Co. This makes available to the smaller stations and advertisers through a lease a composite recorded program of diversified music at a cost much less than live talent.

Radio stations (including those located within the State of Florida), in connection with the presentation of commercially sponsored programs, make charges for the use of musical instruments, rehearsal halls, and other accessories which are a part of the equipment of the broadcasting station. For example, in one year in Chicago the National Broadcasting Co. charged a flat rate of \$100 per week from each account using the organ facilities of the station. Each client paid the round sum of \$5,000 per year for the right to use this instrument. Some eight accounts used the organ for eight shows, and at the rate of \$100 weekly paid \$40,000 a year for rental of this particular type of musical instrument. (See Variety, Feb. 5, 1936.)

Indirect Sources

The benefits and income derived from the operation of a radio broadcasting station are not limited to the direct means heretofore described. Many of the broadcasting stations are owned by commercial concerns such as department stores, life-insurance companies, electrical-equipment concerns, radio manufacturers, automobile manufacturers, newspaper companies, etc., which use the broadcasting station as a means of enhancing their good will.

Those stations which deal in electrical and radio equipment receive the benefits of broadcasting in more tangible [fol. 139] form, since it promotes the purchase of equipment produced by them. In fact, the operation of broadcasting stations is of distinct benefit to the entire radio manufacturing industry in that people are constantly purchasing sets, and those who have sets are constantly replacing them in order to obtain the latest improvements in radio receiving sets.

Commercial concerns other than the electrical-equipment and radio-equipment concerns have operated radio stations in conjunction with their businesses. For example, Station

WOR, in New Jersey, is owned by L. Bamberger & Co., Inc., a department store, and at stated intervals in the course of their broadcasts stress has been laid upon an announcement "L. Bamberger & Co., one of America's great stores, Newark, N. J."

Similar uses of radio broadcasting stations, for the purpose of advertising independent business enterprises owning the stations, are employed in the State of Nebraska.

The benefit derived from this form of advertising, for which the department store pays nothing, is a separate advantage which cannot be estimated in financial returns.

A list of some of the stations owned and operated by commercial concerns is:

KSUN, Copper Electric Co., Bisbee, Arizona.

KOY, Nielsen Radio & Sporting Goods Co., Phoenix, Arizona.

KTAR, Arizona Republic & Electric Equipment Co., Phoenix, Ariz.

KFPW, Southwestern Hotel Co., Fort Smith, Ark.

KARK, Arkansas Radio Equipment Co., Little Rock, Ark.

KFWB, Warner Bros. Broadcasting Co., Los Angeles, Calif.

WTIC, Travelers Insurance Co., Hartford, Conn.

KFBI, Farmers & Bankers Life Insurance Co., Abilene, Kan.

WBZ, Westinghouse Electric & Manufacturing Co., Boston.

WNAC, Shepard Department Store, Boston, Mass.

KSTP, National Battery Broadcasting Co., St. Paul-Minneapolis, Minn.

WJDX, Lamar Life Insurance Co., Jackson, Miss.

KFEQ, Scroggin & Co., Bank, St. Joseph, Mo.

[fol. 140] KOIL, Monamotor Oil Co., Omaha, Neb.

WHN, Marcus Loew Booking Agency, New York City, N. Y.

WHAM, Stromberg-Carlson Telephone Manufacturing Co., Rochester, N. Y.

WGY, General Electric Co., Schenectady, N. Y.

WTMJ, Milwaukee Journal Co., Milwaukee, Wis.

WLW, Crosley Radio Service, Cincinnati, Ohio.

WJAR, Outlet Co. Department Store, Providence, R. I.

WTAQ, Gillette Rubber Co., Green Bay, Wis.

KGHL, Northwestern Auto Supply Co., Billings, Montana.

Station WLW, operated by the Crosley Radio Service, manufactures radio sets and other mechanical equipment. Their products are constantly advertised over radio station WLW in connection with its operation. As a result, a record number of sets were sold last year.

The Radio Corporation of America is a manufacturer of radios, equipment, etc. Its chief subsidiary, the National Broadcasting Co., operates and manages more than 12 radio stations which advertise the products of the Radio Corporation of America. In 1935 the Radio Corporation of America grossed \$87,563,646, an increase of 13.3 per cent over 1934, which was \$77,300,112.

There were one hundred and ninety-two newspaper-owned radio stations on January 1, 1937. These stations have been found very useful in increasing the circulation of a newspaper.

The Milwaukee Journal Co., operators of radio station WTMJ, has said that a radio station is a valuable adjunct in stimulating the activities of a newspaper. Variety, September 2, 1935, reports the following:

“Radio Helps Sell Paper, Says WTMJ

“A question contest just completed by WTMJ, owned by the Milwaukee Journal has disclosed that in the case of this station, at least, radio is helping sell the Journal. Fifth in preferences of the outlet's programs was its news broadcasts, with replies coming from listeners indicating this factor and also that the news spots served to fill in when [fol. 141] it was impossible to get a paper. Several answers were directly to the point that the broadcasts increased the desire to see the Journal.

“Contest was put on to build afternoon audiences and to get information on the afternoon listeners for sales-promotion purposes. Various cash prizes were awarded to listeners answering questions and telling of their favorite WTMJ program.”

George H. Payne, Federal Communications Commissioner, October 31, 1935, said:

“Advertisers are interested in selling goods and want entertainment only as it creates an audience to which they can address their patter.”

John W. Elwood, vice president in charge of program development of the National Broadcasting Co., in an address filed with the Federal Radio Commission, August 15, 1930, said:

"Radio is a show business, * * * But radio was and still is accepted essentially as a show—something to which one may turn as a diversion from the daily cares of business or the home. We look to it for music, for drama, for descriptions of important events, for daily vaudeville. * * * It (radio) is built upon bricks and mortar laid by musicians, literature, playwrights, and authors since the beginning of civilization. * * * What the public demands from radio is entertainment. * * * The person or institution failing to recognize that radio is essentially an entertainment medium is firing blank cartridges when it broadcasts. * * * Broadcasting, from a business angle, is the essential promotion agency of a great industry; namely, that of manufacture and sale of radio-receiving sets, speakers, and accessories.

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"Let us not lose sight of the fact that there are nearly 600 radio stations in the country and that a relatively small percentage of the total time on the air is devoted to education per se. The licenses (to operate radio stations) are granted with the requirement that the authorized stations operate to the public interest, convenience, and necessity. [fol. 142] There are undoubtedly many programs broadcast which would be difficult to recognize as coming within any of these classifications."

Issuing Blanket Licenses Is the Only Workable System for the Benefit of Both Users and Creators of Musical Compositions

Justice Parker, in his report (Mar. 22, 1935) said:

"* * * The logical basis, of course, would have been to make individual charge for each performance of each individual work, but this basis had been found in European countries not to be practicable. Owing to the fact that the joint repertoire of the several societies was so large, and the use of it by the music users so frequent, it would have been necessary for the societies to prepare thousands of

different prices for the many classes of works for their use in many different types of establishments, to numberless sizes of audiences, but in particular it would have been necessary for the music user and the societies to prepare and check expensive and troublesome accounts of the works performed and of the length of times of performances, and of the numbers of the audiences, in order to reckon the amount due, greatly increasing the cost of the societies' operations and greatly increasing the necessary fees. In other countries all this was seen to be unnecessary as soon as the scope of the societies' repertoire was recognized; as soon as the music user came to realize that of the works he desired to perform in his performances a large part, and in some cases practically all, were works controlled by the societies. There has, therefore, come into use in other countries a license permitting performances at will, to any extent, from the joint repertoire of the societies, that is to say, a right of user license."

Notwithstanding the impossibility of issuing licenses for the public performance for profit of copyrighted musical compositions on a per-piece basis, as pointed out by Judge Parker, the States of Montana, Washington and Tennessee enacted statutes which made such a system compulsory. Those States, although purporting to regulate monopolies, [fol. 143] provided that the alleged monopolies would be lawful if they issued licenses on such a per-piece basis.

On its face, this showed that there was no bona fide desire for a per-piece system on the part of the users, but that the real object of those provisions in the Montana, Washington and Tennessee Statutes was to make it impossible for a single individual copyright owner to license his compositions in those States.

In addition to the observations of Judge Parker attempted compliance with the Montana, Washington and Tennessee Statutes would require the maintenance of a detective force to supervise the over 30,000 establishments in the United States which use music, to make certain that the users compensate the copyright owners for all the musical compositions publicly performed by such users for their own profit within those States.

The cost of maintaining a corps of investigators, the cost of maintaining a staff of listeners-in to cover some 600 radio broadcasting stations would entail an annual expenditure

in excess of \$2,000,000, an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate.

The fact of the matter is that no other group of users has ever requested or expressed the desire to bargain separately for any single number, or group of numbers, or a catalogue of numbers. The first suggestion came in 1932 from some members of the radio industry. The industry itself has never been unanimous in support of any such suggestion.

[fol. 144] Night clubs and dance halls, cabarets, restaurants, hotels, and motion pictures keep no logs of music use. Under the Federal Communications Act all that the radio stations are required to report to the Commission is the general nature of the programs, that is, whether they are dramas, music, speeches, etc. The log kept in that manner is conceded to be worthless as a basis for any system requiring individual creators of music or their publishers, to deal separately with users of music for licensing the public performance for profit of individual copyrighted musical compositions. Very few stations keep their radio logs, and whatever logs are kept are inaccurate.

Even in the case of larger stations, which presumably have the staff to keep a record of the compositions played, experience has shown that they fail to record and report properly. Thus, in 1935 the Columbia Broadcasting Station, the second largest broadcasting company in the United States, failed to include in its log a composition which was played by the Philadelphia Symphony Orchestra. The composition did not appear on any of the logs furnished, and it was only after several inquiries by the copyright owner, who was not a member of the Society, that it was ascertained that the composition was broadcast as a request number by way of an encore, and therefore did not appear on the log.

Comparisons made between the logs of the stations and the numbers as taken down by various persons disclose many omissions and errors.

[fol. 145] Smaller stations are opposed to such system of individual licensing because of the tremendous expense and hardship which would be imposed upon them.

Thus, an owner of one of the smaller radio stations, station KLUF, located in Galveston, Tex., wrote the Society as follows:

" * * * I wish to add a word or two in regards to any future change of charges, such as I have read in Broadcasting—there seems to be a move on to change the manner in which they copy 'rite' fee shall be—favorable comment about charging so much per piece broadcast—this would be a distinct hardship upon us, because our force is very limited, and this would necessitate more clerical work which we are not prepared to undertake, and while it is sometimes hard to pay your price per month, still it is much easier than to do any other way—at least I think so."

Broadcasting Stations in Florida do not keep a record of all the musical compositions broadcast by them.

Owners of larger stations have likewise opposed the per piece system. Thus the owner of station WCAU, part of the Columbia Broadcasting Chain, in the magazine Broadcasting, stated in no uncertain terms his opposition to any system of individual licenses as being practically impossible of operation.

Even in the matter of reporting the sums of money, which is by far a simpler operation than the recording of the musical compositions, many stations have failed to accurately report the moneys received by them, so that the share to be given to the Society could be ascertained. A fair percentage of the broadcasters have failed to report on the actual income due to the Society and have been arbitrary in their attitude.

[fol. 146] There is no way of placing a value upon the performing right, of a single number or a group of numbers, or even of the numbers of an entire catalogue of a particular music publisher. Each number has an entirely different value. Many factors must be taken into consideration, such as the celebrity of the composer, the popularity of the song, the frequency of repetition, the nature of the use, whether for radio, dance hall, motion picture, cabaret, hotel and night club, the size of the orchestra, the number of people witnessing or listening to the performance, the direct or indirect profit made by the user from the performance, the particular numbers played to make a complete program, and a host of other factors. The State Statute makes no provision for such factors and differences.

These Statutes, while ostensibly drawn to provide for a compulsory system of individual licensing, are actually designed and must inevitably lead to the destruction of complainants' rights, for the reason that no such system is possible.

No records can be kept which will insure payment under such system, for, in order to keep such records a tremendous burden would be imposed upon the users of musical compositions in those States.

Many of these users (including users in those States as well as in Florida) pay very nominal license fees to the Society, some as low as \$20.00 a year.

It will cost a great deal more than that for these users to install a system of bookkeeping and accounting that would have to be installed under such system.

The amount now paid by users in those States would not [fol. 147] be sufficient to reimburse complainants and others similarly situated for the necessary expenditures that they would have to make in order to investigate and check up on individual uses of their compositions as well as the necessity for the employment of accountants to examine reports from users and ascertain whether payments have been made honestly or otherwise.

The users in Nebraska and Florida have attempted to secure the free use of these copyrighted compositions in the public performance for profit by a different method, and one which would not involve them in the expense and trouble of keeping complicated accounts and making endless negotiations for individual licenses with owners of copyrights.

The scheme in Nebraska and Florida was very simple. Upon the purchase of a sheet of music, the purchaser, under the Statutes enacted in those States, has been given the right to make public performances for profit, as well as records and transcriptions and other uses of the copyrighted composition, without making any payment whatever other than the initial purchase price for the sheet of music or the record to the owner of the copyright.

The Nebraska Statute was passed before the Florida Statute (May 17, 1937), and was openly sponsored by the Amusement Protective Association of Nebraska. That organization secured the passage of the Statute by representing to the users in that State that if the Statute were

passed, they would no longer be required to pay for the public performance for profit of any copyrighted musical composition. Their members were circularized by the following letter:

[fol. 148] "Amusement Protective Association of Nebraska
301 South 31st Street—Omaha, Nebraska

Matt Kobalter Director, Lincoln. Joseph W. Smith, Director, Hastings. Bert Glover, Director, Grand Island. Joseph Malec, Pres., Omaha. H. H. King, Vice-Pres., Norfolk. H. A. Marble, Sec'y & Treas., Omaha. William Barclay, Dir., Plattsmouth. George Sharpnack, Dir., Lincoln. Roy F. Gordon, Dir., Bennington.

March 13th, 1937.

DEAR SIR:

At a meeting of more than twenty-five representative ballroom operators held at the Fontenelle Hotel, Wednesday, March 11th, this organization was formed for the protection of all operators in regard to state legislation or any forces which might take unfair advantage of us. The men listed above were chosen as officers of the organization.

Our First Big Problem is the Promotion of the Bill 478 Which Will Protect Us Against the Payment of the So-called License to Play Copyrighted Music at Public Performances for Profit. We have been forced to pay the American Society of Composers, Authors and Publishers long enough and we believe that if we all do our part, we will be able to keep this graft out of the state of Nebraska.

In order to aid in passing the Legislation Roll No. 478 which is of vital interest to us all, we are making the following suggestions:

1. Get in touch with the legislator from your district That You Know and explain to him how the monopoly created by the American Society of Composers, Authors and Publishers has unfairly collected from You and other operators year after year. Explain to him that you are vitally concerned with this legislation. Do not write or talk to any of the legislators that you do not know as too many letters or calls from strangers will only agitate them.

2. Attend the next meeting of the Amusement Protective Association of Nebraska to be held at Lincoln, Nebraska

at 10 a. m. Wednesday, March 17th at the Lincoln Hotel. The bill will be completely discussed at the meeting after which the operators will retire in a body to the committee meeting where the actual legislation will come up. It is Vitally Important That You or a Representative Be Present as every effort we can give will be necessary to show [fol. 149] this committee that every dance hall operator is interested in this protective measure.

3. So that you might be familiar with the proposed legislation, read over the enclosed sheet before you contact your legislator and before you attend the meeting at Lincoln.

Thanking you in behalf of the newly formed organization and trusting that we may count on seeing you at Lincoln on Wednesday to help us put this big job over, we are,

Sincerely yours, Amusement Protective Ass'n of Nebr., (Sgd.) by H. A. Marble, Sec'y."

In an action brought in the Federal Court of Nebraska, to enjoin the State officials of that State from enforcing the Statute, the Special Assistant to the Attorney General of Nebraska, William J. Hotz, Esq. (who was then, and had theretofore been, counsel for the above group of users) submitted in opposition to the motion for temporary injunction, a countershowing containing many affidavits of users of music in that State, seeking to justify the Statute. The following are a few quotations from the affidavits:

" 'Why should I pay an orchestra and then be fined for what the orchestra plays? It's like going to hell for somebody else's sins.' " (Aff. of E. J. Branigan, p. 22.)

"Affiant further states that the amount of money paid by a hotel such as the Fontenelle for music to orchestras, bands and singers in a year amounts to many thousands of dollars, but the American Society of Composers, Authors and Publishers likewise claims that even after the musicians have bought their music, and even though orchestrated by the publisher or the composer for no other purpose than public performance, and purchased for no other use, still the society demands and collects additional fees and so-called royalties, and with no way except the enforcement of the [fol. 150] Nebraska Act to curb further action of the combination as such." (Aff. of I. A. Medlar, p. 104.)

"Affiant states that in no way did he wish to or attempt to violate the copyright law but that if the orchestra in buy-

ing their music did not pay the royalty then his company certainly would not." (Aff. of F. D. Brodfuehrer, pp. 25-26.)

"Affiant says that he considers the charges for the music and band sufficient enough without having to pay the exactions demanded by A. S. C. A. P." (Aff. of A. J. Diedrich, p. 28.)

"Affiant further states that he placed on January 1, 1937, two notices on either side of the shell from which the orchestra played and which were in full view of the members of the orchestra which read:

Notice

Orchestras playing from this shell:

Do Not Play Copyrighted Music

1733 Nite Club

(Signed) Ben Griffin."

(Aff. of B. Griffin, p. 34.)

"Affiant further states that he is the *president* of the Amusement Protective Association of Nebraska, which is made up of a large number of the owners of similar pavilions and amusement park owners throughout the State of Nebraska, with a membership of about 390; that the association *took an active part* in having Legislative Bill No. 478 enacted into law, and took an active part in presenting the matter before the Legislature of the State of Nebraska and making demand for the passage of the bill as an effective, common sense protective measure for our people." (Aff. of Joseph Malec, p. 50.)

Attention is called to a scheme employed by one of the users to evade the payment of royalties to any copyrighted owner, and that is the notice to the orchestras not to play copyrighted music at the "1733" Nite Club.

The utter insincerity of the notice is manifest when it is considered that this was a place at which people dance, and that it would be impossible to give a pleasing, entertaining dance program of music without using modern copyrighted music. All music that is currently popular is copyrighted, whether by members of the Society or others.

[fol. 151] The motion for temporary injunction in the Nebraska suit came on for hearing before a Statutory Court

consisting of Archibald K. Gardner, U. S. Circuit Judge, Thomas C. Munger, U. S. District Judge, and James A. Donohue, U. S. District Judge. After due deliberation, that court on or about November 13, 1937, granted the motion for injunction and handed down its opinion and made an order for temporary injunction. Copies of the opinion and order are annexed to this affidavit at the foot thereof, as Exhibits "J" and "K" respectively. A copy of said Nebraska Statute is annexed hereto as Exhibit "L".

I have been informed and believe that the Florida State Statute was drafted by Mr. H. T. Rogers, a Florida attorney, who has for many years represented Robert Kloeppel, the owner of the Hotel Mayflower, in Jacksonville, Duval County, Florida. Mr. Kloeppel, refusing to pay license fees for the public performance for profit of the musical compositions of members of the Society and others, the Society brought suit against him in the Southern District of Florida, Jacksonville Division (Buck v. Kloeppel, 827-Eq.-J.). The suit was brought for infringement of a musical composition entitled "The Old Spinning Wheel", composed by William J. Hill, one of the complainants herein. This song is very popular and has been played and sung in every nook and corner of the United States, including the 50,000 establishments for entertainment wherein music is regularly performed for profit in this country. It is an outstanding song and will probably survive the composer and add luster to his memory.

In that infringement suit, Mr. Kloeppel, in an answer signed by the aforementioned H. T. Rogers, interposed, as one of his defenses, the following: (Ans. Par. 8.)

"Answering Paragraph 9, Defendant denies that Billy [fol. 152] Hill, a citizen of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition, and denies that the said Billy Hill composed and set original music to the said words and lyrics, which constituted a musical composition entitled 'The Old Spinning Wheel'. On the contrary, this Defendant alleges that the said musical composition referred to in said Bill of Complaint as being the Plaintiff's, was produced and made up by the unlawful use and appropriation of numerous copyrighted compositions and publications which were not, and never have been the property of Plaintiff, and which were appropriated, used, copied, pirated and em-

ployed by Plaintiff in defiance of the rights of authors and proprietors of same, and in violation and infringement of the copyrights thereof. Defendant admits that the publisher plaintiff represented to the Librarian of Congress that such Plaintiff was the author and proprietor of such musical composition, and thereupon sought to obtain copyrights of the same, but Defendant denies that said Plaintiff's action in that respect was in accordance with the statutes of the United States enacted for the purpose of copyright, and alleges upon information and belief that publisher Plaintiff's acts were in fraud of the statutes of the United States and constitutes an unlawful attempt to obtain copyright by publisher Plaintiff for material and substantial parts of the musical compositions of other persons for whose protection copyrights had theretofore been granted under the laws of the United States."

By that defense Mr. Kloeppel attacked the validity of the copyright in that musical composition, and its originality, and in effect designated Hill as a pirate and an infringer of other musical compositions.

If there were no Society, and Hill had brought a suit for infringement in Florida, he would have to meet the issue tendered by the above defense. He could adequately protect his rights, as well as his good name, only by engaging a lawyer skilled in the art of copyright litigation, at great expense, and he would have to produce, at his own expense, witnesses to testify to the origin of the composition, and he would have to engage, at his own expense, the services of an expert to testify with respect to all of the compositions involved in this issue, and who would advise his attorney [fol. 153] with respect to the proof adduced by the other side, expert and otherwise.

Needless to say, that would be a burden which Hill could not undertake. He is a man of modest means. I have known him for years, and know that his chief source of livelihood is the modest royalties that he draws from his compositions and the royalties that he draws quarterly from the Society.

The Society does not disclose specific instances of help given to its members and other composers, but I cannot resist the temptation to set forth a short statement made by Mr. Hill before the Patents Committee of Congress on February 27, 1936. Inasmuch as this statement has become a matter of public record and is printed in the Report of the

Hearings on a number of Copyright Bills then up for consideration, it divulges no confidence to set it forth here. It reads as follows:

“Mr. Hill: Mr. Chairman, years ago I came to New York. Shortly after that, I was made a member of the American Society. I did not have 5 or 6 cents; I only had about 3, and my wife was very ill with a nurse in a hospital on Eleventh Avenue. She was going to have a baby. They would not bring her up to the operating room until I got there with the money I was supposed to bring.

“Nobody had ever heard of me; my songs had never been heard of; I came to New York friendless and nobody had ever heard of me. I worked as a bus boy; I worked at anything I could get. I went up to see Mr. Buck of A. S. C. A. P. and told him the trouble I was in and in 15 minutes I had a check for \$250, and I was on the way to the hospital.

“My little girl is 3 years old now. They were turning off the gas on the same day and I will tell you the truth, if it was not for Mr. Buck I would have used that gas for something else. I mean it. I cannot tell you just what I mean, but that is just what I would have done. And that is why the Sirovich bill is so much more important to me than the Duffy bill.

[fol. 154] “If you will please forgive me, that is all I have to say.”

I know Mr. Hill's statement to be the truth, because, as he says therein, he came to me, and on behalf of the Society I made it possible for him to survive those troubled times, and made it possible thereafter for him to compose a great many successful songs, including “The Old Spinning Wheel”.

Coming back to Mr. Kloeppel's answer: He also denied that he had played that musical composition on the day in question; and although he denied playing the composition, he set forth in another defense, that his orchestra leader had received a professional copy of the song, furnished by the publisher, which constituted a license to perform.

Even with the Society functioning to detect infringement and to bring suits thereon, the Kloeppel case illustrates the impediments that are constantly put in the Society's way by users who are determined to perform copyrighted compositions for profit without the payment of any royalties.”

The Society is put to great expense in keeping a vigilant eye on such infringers; and with all its resources it has had great difficulty, over the years, with many of its infringement suits. Users have been clever and ingenious in interposing all sorts of defenses to the limit of human ingenuity.

In another suit pending in Florida (Buck v. Adams, Jacksonville Division, In Equity #810-J), the defendant operated the Ocean Beach Hotel at Atlantic Beach, Duval County, Florida. Charged with having infringed upon "The Old Spinning Wheel", by public performance for [fol. 155] profit, by means of an orchestra playing it in the hotel pavilion, Adams interposed the following ingenious counterclaim: (Ans. Par. 25-o)

"o. That this defendant, W. H. Adams, is President of the Ocean Beach Hotel Company, a Corporation, and as such President is the Manager of the Atlantic Beach Hotel at Atlantic Beach in the County of Duval and State of Florida; that this defendant has never individually, nor as President of the Ocean Beach Hotel Company, a Corporation, or otherwise, performed or had performed at his instigation, any copyrighted musical works for profit, nor has this defendant ever wanted, desired, needed or required the performance of any copyrighted musical works for profit; * * *."

The method by which that defendant attempts to evade responsibility is exposed by one Henry C. Berg, at present a member of the Bar at Jacksonville, Florida, who, in August, 1934 (the year of the infringement) was in Mr. Adams' employ. Mr. Berg answered the following questions propounded by the Society's attorney, William E. Arnaud: (The questions were contained in a letter dated August 20, 1935 and the answers in Mr. Berg's letter dated August 21, 1935)

"1. Who furnished the pavilion for dance purposes, and what rental, if any, was paid for it? A. The pavilion was furnished by the hotel or its management, and, so far as I know, no rental was ever paid for its use.

"2. Who was responsible to the musicians for their pay? A. I know nothing of the contract with the musicians. It was entered into, I believe, before I began to work for the hotel.

3. What part of the gate receipts did Mr. Adams receive?

A. I do not know; I usually collected the gate receipts and turned them over to the management of the hotel.

4. Was there a sign posted in the lobby of the Atlantic [fol. 156] Beach Hotel to the effect that guests of the hotel might obtain tickets at the hotel desk which would entitle them to free admission to the pavilion with privilege of dancing? A. Yes, I printed it myself, under instructions from Mrs. Adams.

5. Were guests of the said hotel admitted to the dances at the pavilion on August 25, 1934, and at other times during the summer of 1934, without having to pay an admission or other charge. A. As well as I remember, guests of the hotel were admitted to the dance on August 25, 1934 as well as on the other dates on which dances were held. No admission was charged them so far as I know.

6. Was the privilege of dancing in the pavilion offered to prospective guests as an inducement for them to patronize the hotel? A. I suppose so. No secret was made of the dancing, and I suppose that prospective guests knew of it. I do not recall ever having told prospective guests about the dancing while I was on duty at the main desk in the lobby of the hotel.

7. Was Mr. Adams in charge and control of the dances and did you have to carry out his orders relative thereto? A. Mr. Adams was always present at the dances, but I do not know who was actually in charge and control of the dances; I suppose that it was either he or Mrs. Adams. I had to carry out orders coming from both of them, and from W. H. Adams, Jr., also, who worked in the hotel and was in charge of the bathhouse adjoining the hotel.

8. What were your arrangements with Mr. Adams for the performance of music for dances? A. I had nothing to do with any arrangements for the performance of music for the dances. I merely collected the gate receipts, and endeavored to see that the hotel guests enjoyed themselves at the dances.

9. Were you requested by Mr. Adams to sign a contract for the conduct of these dances in order to hold your job with him or the hotel management? A. One evening, the exact date of which I am unable to recall, Mr. Adams brought me

a charter of 'The Atlantic Beach Dance Club' and told me to [fol. 157] sign it. I did so. I do not recall ever having signed any contract for the conduct of the dances.

10. Did your contract of employment with Mr. Adams or the hotel management require you to run these dances and to sell and collect for tickets or admission thereto? A. My contract of employment was merely a verbal one; part of my duties were to sell and collect tickets at the dances, and to do anything else in the way of running the dances which I was told to do.

11. State any other facts which show that you and Mr. McClellan were merely conducting the dances for Mr. Adams or the hotel management. A. I was employed as a desk clerk in the hotel, and my duties in connection with the dances were incidental thereto. I never received any extra compensation or profit whatsoever from the dances. Mr. McClellan had best answer your questions himself, although I might say that he was merely an employee like myself. His duties were chiefly in connection with the bathhouse.

12. Was the pavilion a part of the hotel premises and adjacent thereto? A. Yes.

13. Did Mr. Adams give you, or anyone else instructions not to play copyrighted music at these dances? A. Mr. Adams never gave me any such instructions; whether or not he gave them to any one else, I do not know."

Similar instances of the interposition of ingenious defenses could be multiplied ad infinitum.

Obviously, the individual composer or publisher, dependent upon his own financial resources, is in no position to protect his rights of public performance for profit against infringement, particularly when we consider there are 30,000 establishments throughout the country that are performing musical compositions by the hundreds every day and night, and that even obtaining evidence of infringement is a difficult and expensive process, let alone the cost of engaging a lawyer and experts competent to cope with the defenses interposed by infringers.

[fol. 158] The State Statute was introduced in the Senate by Hon. John R. Beecham, State Senator, who is also the chief executive of radio broadcasting station WJNO, at West Palm Beach, Florida.

The Statute was introduced for the private benefit of the Florida radio broadcasters and hotel owners, who have powerful local trade associations. The Florida Association of Broadcasters has a membership of the following stations: WFLA, WFOY, WIOD, WJAX, WJNO, WLAK, WMBR, WMFJ, WTAM, WRUF, WSUN, WTAL. Senator Beecham is one of the members of the executive committee of the Association.

The method pursued by the broadcasters in sponsoring legislation similar to the State Statute is typified by the activities of E. B. Craney, owner of Station KGIR of Butte, Montana. Mr. Craney sponsored the Montana Statute, which was passed in the Spring of 1937. (In that State, suit was commenced by the Society in the Federal Court of Montana, and a motion for temporary injunction heard before a statutory court, which said motion is still undetermined.) Mr. Craney also sponsored a similar bill in Congress, but it was not passed.

In his campaign in Congress to obtain votes for his bill, Mr. Craney sent to each Congressman and United States Senator, the following circular reproduced on pages 72 and 73 hereof:

(Here follows one photolithograph, side folio 159)

CAN

YOU

BE

REFLECTED?

[fol. 160]

April 27, 1937.

Your reelection will depend upon your being heard by people in your own state. To reach your constituents you must use the Independent broadcasting stations in your state, not one of the big national networks, as that would be impractical. To insure free speech these independently operated broadcast stations are very necessary. If you are going to protect and perpetuate these independent stations, you should read All of the attached. It was sent you in February and many of you read it. I call your attention to the fact, that although Mr. Mills of ASCAP in his letter of January 27th asked for suggestions to improve the relationship between his group and independent broadcasters, and although these suggestions were given under date of February 5th, Mr. Mills evidently was acting in Very Bad Faith because to date nothing has been heard from him.

Congress—

The Independent Broadcasters of the United States Ask Your Cooperation. Please Familiarize Yourself With Our Problem. Kindly Read the Attached and Then Take Action.

[fol. 161] Similar instances may be multiplied of "high pressure" methods used upon legislators by broadcasters who control an instrumentality that is so very powerful in helping to form public opinion and thus determine whether or not candidates for office should be elected.

Radio, which is a medium for great good, has been subverted to the selfish ends of users of music to help free them from the duty of paying for the one medium without which radio could not exist—music.

Although the State Statute purports to give to complainants and others similarly situated the right to fix a price for the public performance for profit of their copyrighted musical compositions, within the limits of the Statute, the creator of the work or the owner of the performing rights is prevented from licensing such right apart from the sale of the physical copies of particular copyrighted musical compositions. In actual operation this would result in denying composers and authors any compensation for this form of use of their respective creations, and would in effect destroy that particular right vouchsafed to them under the Copyright Acts since 1897.

The Statute not only attempts a system of compulsory price-fixing, but reaches out extraterritorially and compels the copyright owner to modify existing contracts with radio broadcasting stations beyond the State of Florida, or, in the alternative, to forego the right to collect from users in Florida for a license to publicly perform his works for profit, or to forego his right to treat as infringers owners of radio broadcasting stations or motion picture houses or theatres, who publicly perform for profit these copyrighted [fol. 162] works without the consent of such copyright owner.

Many request numbers are played as spontaneous encores in the course of an evening's entertainment in dance halls, cabarets, hotels, etc., and occasionally on radio. This is possible only under some form of blanket license. Blanket licenses allow radio stations to make last minute substitutions made necessary by operating difficulties, failure of artists to show up, etc.

It is difficult to report accurately the music performed, the writers, publisher and copyright owner of each. Large stations with expert staffs are unable to report entirely accurately, and it is inevitable that small stations would have greater difficulty because of lack of facilities.

By the use of the reservoir of available music, under a blanket license, there are saved expenditures that would be entailed if each musical composition had to be separately applied for and cleared and reported.

Apart from broadcasting, the Society has been unable to procure any return as to the compositions played by the user. In some cases, music is played by ear; in others, the performers themselves cannot or will not supply the details.

The amounts paid to the Society by the users of music in Florida for the public performance for profit of all the musical compositions of approximately 4,000 composers, average for 1936, approximately:

Radio broadcasters, \$2,432.00 per year, per station.

Motion picture theatre exhibitors, \$81.00 per year, per theatre.

[fol. 163] Restaurants, \$84.00 per year, per establishment.

Hotels, \$80.00 per year, per hotel.

Dance halls, \$85.00 per year, per dance hall.

Miscellaneous establishments, \$103.00 per year, per establishment.

If these establishments were required to maintain a system of inspection and accountancy and bargaining for each composition and to report the same, the expense which would be imposed upon each establishment for such purposes would obviously greatly exceed the average license fee paid by such establishment to the Society.

About six or seven years ago, Warner Bros. Pictures, Inc., an outstanding producer of motion pictures, purchased the entire stock interest of a number of well known music publishing firms in New York, the principal ones being M. Witmark & Sons, Harms, Inc. and Remick Music Corporation. These companies were approximately of the same size as the complainant, Irving Berlin, Inc. Warner Bros. paid \$11,000,000 for the ownership of these corporations. That gives some indication of the value of the catalogues of the three publisher complainants herein, all of which are prominent publishers—Irving Berlin, Inc., one of the leading publishers of popular music, Carl Fischer, Inc., and G. Schirmer, Inc., being two of the leading publishers in the country of classical and standard musical compositions.

The reason why an order to show cause is prayed for is because the State Statute was enacted in June, 1937 and was signed by the Governor of Florida on or about June 9th, 1937 as an emergency measure, and has gone into effect. If the operation of the Statute is not restrained, complainants [fol. 164] will be compelled to forego their valuable rights under their contracts by threat of forfeiture and confiscation, as well as by threat of the enforcement of the criminal provisions of the Act.

The season during which the copyrighted music of the complainants is most frequently publicly performed for profit in the State of Florida is about to commence, and a temporary injunction is necessary in order to protect complainants against unlimited infringement of their copyrighted compositions. The season is very brief, extending from approximately the present time, to the fifteenth of April.

A motion for an injunction was not made sooner because the complainants felt that a decision might be rendered in the interim by the Statutory Courts in Washington and Montana. Although the statutes in those two states differ in some respects from the Florida statutes (but having essentially the same objective) it was felt that decisions in those States would be of help to this court in disposing of

the issues raised in the instant case. No decisions have been rendered, however, by the courts of Montana and Washington, and since the Florida season is now under way, a motion for temporary injunction is both timely and urgent.

Wherefore, I respectfully pray that a temporary injunction issue, as prayed for in the bill of complaint.

Gene Buck.

Sworn to before me this 21st day of January 1938.
Marian Elkin, Notary Public New York County.
Com. Expires March 30, 1939. (Seal.)

[fol. 165] EXHIBIT "I" TO AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND
FOR THURSTON COUNTY

No. 16114

STATE OF WASHINGTON ex Rel. G. W. HAMILTON, Attorney-
General, Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
an Unincorporated Association, et al., Defendants

DECREE

Filed Superior Court, Thurston Co., Wash., June 8, 3:01
P. M. 1936. Ellis C. Ayer, Clerk, by Edwidge LaFond,
Deputy

This matter coming regularly on before the court for a hearing upon the petition of the defendant, American Society of Composers, Authors and Publishers, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

It is Now Therefore Ordered, Adjudged and Decreed as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"),

a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a convenience and necessity to the users of music in obtaining the performing rights.

[fol. 166] 3. That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.

4. That the Society was formed for lawful purposes and that the plan being used by the American Society of Composers, Authors & Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors & Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not violative of any of the laws of the State of Washington, or of the Constitution.

5. That the Society serves a beneficial and useful purpose as a clearing house through which users may obtain and clear performing rights in musical compositions.

6. The receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid direct to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annul-ed, and any and all such assignments of copyright or rights in copyrights are hereby canceled and annul-ed, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

[fol. 167] 9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. That the complaint herein be dismissed upon the merits.

11. It is further Ordered, Adjudged and Decreed that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

Done in open court this 8th day of June, 1936.

(Signed) D. F. Wright, Judge.

[fol. 168]

EXHIBIT "J" TO AFFIDAVIT

Nebraska Opinion

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

Equity. No. 562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; et al.,
Complainants,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants

MEMORANDUM OPINION

Per CURIAM:

The plaintiff, Gene Buck, as an individual and as President of the American Society of Composers, Authors and Publishers, brought suit against Harry R. Swanson, as Secretary of State of Nebraska and against certain other state and county officials, seeking to enjoin the defendants from enforcing the provisions of an act of the legislature of Nebraska, approved May 17, 1937 (Nebraska Session Laws 1937 page 488). That Act makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization, either in Nebraska or elsewhere, if one of the objects of the organization is the determination of license fees required for the use of copyrighted [fol. 169] musical compositions for profit in Nebraska, for the purpose of preventing free competition between different copyright owners. There are provisions penalizing any attempt to collect license fees by owners of copyright, and requiring any author, composer or publisher, to specify on any published musical composition prepared for use in Nebraska, the selling price of such composition. Many other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their

products in the state of Nebraska. The plaintiffs have alleged that the enforcement of the Act will violate rights granted to them by the Copyright Act of Congress (17 U. S. Code Section 1 et seq.), and that the Act is in violation of Section 8 of Article 1 of the Constitution of the United States, and also impairs the terms of existing contracts held by the plaintiffs.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act, to the great damage of the plaintiffs unless restrained by an order of this court. The application for a temporary injunction has been submitted upon the complainants' bill, and upon certain affidavits filed, and also upon the defendants' motion to dismiss the bill of complaint.

On consideration of the bill, it appears that there is a grave doubt of the constitutionality of the Act of the Legislature, and the plaintiffs have shown that serious and irreparable injury will be inflicted upon them if a preliminary injunction is not awarded to them and that the plaintiffs have no adequate remedy at law. A preliminary injunction, upon the usual terms, will protect both parties, pending a final decision. An order will, therefore, be entered granting a preliminary injunction. The motion to dismiss the plaintiffs' bill will also be denied.

[fol. 170]

EXHIBIT "K" TO AFFIDAVIT

Nebraska Decree of Temporary Injunction

In the District Court of the United States for the District
of Nebraska, Lincoln Division

Equity. No. 562

GENE BUCK, Individually and as President of the American
Society of Composers, Authors and Publishers, et al.,
Complainants,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et al.,
Defendants

Order

This cause to be heard at this term (under section 380, Title
28, U. S. C. A. Judicial Code, Section 266) and the Court

sat as provided therein, and the cause was argued by Counsel; thereupon, upon consideration thereof, it was ordered and adjudged as follows:

I

That the motion made by the complainants for temporary injunction be and the same is hereby in all respects granted.

II

That the defendants, Harry R. Swanson, individually and as Secretary of the State of Nebraska, Walter H. Jensen, individually and as State Treasurer of the State of Nebraska, William H. Price, individually and as Auditor of Public Accounts of the State of Nebraska, Richard O. Hunter, individually and as Attorney General of the State of Nebraska, James T. English, individually and as County Attorney of Douglas County, State of Nebraska, Max G. Towle, individually and as County Attorney of Lancaster County, State of Nebraska, Grace Bailard, individually and as County Attorney of Washington County, State of Nebraska, S. S. Diedrichs, individually and as County Attorney of Lincoln County, State of Nebraska, Raymond B. Morrissey, individually and as County Attorney of Johnson County, State of Nebraska, Maynard N. Grosshaus, individually and as County Attorney of York County, State of Nebraska, Charles H. Hood, individually and as County Attorney of Saunders County, Nebraska, Alvin B. Lee, individually and as County Attorney of Valley County, State of Nebraska, Gerald J. McGinley, individually and as County Attorney of Keith County, State of Nebraska, Floyd Lundberg, individually and as County Attorney of Kearney County, State of Nebraska, Edward Moran, individually and as County Attorney of Otoe County, State of Nebraska, and the respective agents, servants and employees of each of them and all other persons acting under or through the authority of each of them or by virtue of the authority of the office of each of them, be and they are each of them severally enjoined and restrained pendens lite and until the further order of this Court from bringing directly or indirectly and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing or executing the State of Nebraska known as Legislative Bill No. 478, passed by the 52nd Session of the Legislature of Nebraska and signed by the Governor on

May 17, 1937, and made effective immediately (said Statute hereinafter referred to as "State Statute") against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from demanding that copies of musical compositions of complainants and others similarly situated be filed, and from bringing any action or proceeding to adjudicate the ownership of copyrighted musical compositions owned by the corporate or individual complainants or others similarly situated, [fol. 172] and from attempting to appoint or take any steps leading to the appointment of a receiver, and from interfering with any and all existing contracts heretofore entered into between complainants and citizens and residents of the State of Nebraska, and between the American Society of Composers, Authors and Publishers and the other complainants or any of said Society's members, and between the American Society of Composers, Authors and Publishers and similar societies located in foreign countries, and between the complainant composers and authors and their respective publishers, and between the complainant publishers and their respective authors and composers, and from threatening to enforce against any citizen or resident of the State of Nebraska the penalties of such State Statute in the event such citizen and resident desires to carry out their contracts with the said American Society and other complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated, for doing any Act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Nebraska or elsewhere, and generally from doing any act or thing to carry on or enforce any of the provisions of said State Statute.

III.

That the motion made by the defendants herein against the Bill of Complaint herein be and the same is hereby in all respects denied.

IV

That the defendants be given thirty days from the date hereof to answer herein.

[fol. 173] . . .

V

The Court finds that unless an injunction order of this nature be issued that plaintiff would be irreparably damaged and that plaintiffs have no adequate remedy at law.

This order is made conditional upon the filing herein within thirty days of an approved bond by the plaintiff in the penal sum of Five Thousand (\$5,000.00) Dollars, conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order, such damages to be ascertained as the Court may direct.

Dated November 10, 1937.

Archibald K. Gardner, United States Circuit Judge.

Dated November 13, 1937.

Thomas C. Munger, United States District Judge.

James A. Donohoe, United States District Judge.

(Filed and entered on Saturday, November 13, 1937.)

NEBRASKA STATUTE

LEGISLATURE OF NEBRASKA

FIFTY-SECOND SESSION

Legislative Bill No. 478***(Final Form on Third Reading)*****A BILL**

FOR AN ACT relating to monopolies; declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appointment of a receiver and injunctive relief and the dissolution of such combination

as here declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representative members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before selling or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Introduced by Frank J. Brady of Holt.

Introduced and read first time February 15, 1937. Read second time
February 16, 1937.

Referred to committee on Judiciary.

Sent to printer February 16, 1937.

Final Form Sent to Printer May 12, 1937

As Enacted By The People of The State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities or the

30 officers, directors, proprietors, managers, owners or representatives
 31 thereof, who render or cause to be rendered, or permit to be rendered,
 32 such copyrighted vocal or instrumental musical compositions privately
 33 or publicly for profit within this state through personal performance,
 34 or through radio, or any instrumentality or sound producing apparatus,
 35 shall be and the same is hereby declared unlawful and illegal; and such
 36 license fees or other exactions shall not be collected in any court with-
 37 in the boundaries of this state; and each collection or attempted col-
 38 lection of such license fee or other exaction by such combination or its
 39 agents, representatives, members, stockholders or interested parties
 40 shall be a separate offense hereunder; and any such combination of au-
 41 thors, composers, publishers, or their heirs, successors or assigns, as
 42 herein defined, is hereby declared to be an unlawful monopoly in this
 43 state; and such fixing of prices for use or rendition of copyrighted mu-
 44 sical compositions within this state by such unlawful combination and the
 45 collecting or attempting to collect such license fees or other exactions
 46 by it or for its stockholders, members or other interested parties within
 47 this state is hereby declared illegal and in restraint of trade, and such
 48 collection or attempted collection thereof is declared to be an illegal
 49 intrastate transaction within this state and shall be subject to the
 50 terms and penalties of this Act. In any action, civil or criminal, in-
 51 stituted under the provisions of this Act, it shall be *prima facie* evi-
 52 dence against any party to such action of the existence of such unlaw-
 53 ful combination for the purposes in this Act enumerated, if a substan-
 54 tial number of all authors, composers, proprietors, publishers, owners
 55 or their heirs, successors or assigns of copyrighted vocal or instrumental
 56 musical compositions in the United States, are shown to be members
 57 of any society, association, club, firm, partnership, corporation, group
 58 or entity.

Sec. 2. (A). All authors and composers, and their heirs and as-
 2 signs, shall have within this state all the benefits conferred by the
 3 Copyright Laws of the United States, being the act of March 4, 1909,
 4 320 Section 1 (e). 35 Stat. 1073, Title 17, U. S. C. A. Each author, com-
 5 poser and publisher shall act independently of any and all substantial

6 number or numbers of other authors, composers and publishers, and
7 also independently of any such combination as in Section 1 hereof de-
8 clared unlawful, in determining and fixing the price to be charged for
9 the use or rendition of his copyrighted musical compositions within this
10 state, and the author, composer or publisher, or his, her, or its heirs,
11 successors or assigns, shall specify or cause to be specified legibly upon
12 the musical composition, in whatever form the same may be published,
13 printed, manufactured or otherwise prepared for use or rendition with-
14 in this state, the selling price thereof for private rendition or public
15 rendition for profit if made available for such public rendition as ar-
16 rived at and determined for all uses and purposes; and when any pur-
17 chaser or user acquires the same within this state and pays the selling
18 price so specified thereon to the seller or publisher of said copyrighted
19 musical composition, then said purchaser or user may use or render, or
20 cause or permit to be used or rendered within this state, the said copy-
21 righted musical composition by persons individually or with other per-
22 formers, actors and singers, or by an individual instrument player, or
23 by orchestras and bands, or over or through or by means of radios,
24 loud speakers, radio receiving, radio broadcasting and radio re-broad-
25 casting stations, electrical transcriptions, musical records, sound ap-
26 paratus or otherwise within this state, and the same may be so ren-
27 dered either privately or publicly for profit when so purchased and paid
28 for without further license fees or other exactions; and such copyright
29 owner or proprietor, in the event of such payment, shall be deemed
30 to have received full compensation for the rendition and all uses of
31 such musical compositions for private purposes or for public perfor-
32 mance for profit by such purchaser within this state.

33 (B). In the event any author, composer or publisher, or any of
34 his heirs, successors or assigns, fails or refuses to affix on the musical
35 composition the selling price, and collect the same, for private and
36 public performances for profit, at the time and in the manner specified
37 in this Act, then any person, firm or corporation in this state who may
38 have purchased and paid for such copyrighted musical composition
39 may use the same for private or public performance for profit within
40 this state without further license fee or other exaction; and such per-

son, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C). Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted music compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D). Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firms or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the state Treasurer who shall credit said fees to the general fund of the state.

Sec. 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be bound thereby; and any member, representative or agent of such

unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Sec. 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B). When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this

31 state, shall be deemed guilty of a violation of the provisions of the
32 Act; and such person, firm or corporation from without this state
33 hereby declared to be an agent and representative of such combination
34 as declared illegal and unlawful by Section 1 hereof, and shall be sub-
35 ject to all the penalties hereof.

Sec. 5. (A). Any person, firm or corporation who owns, lease
2 operates or manages any theatre or theatres, moving picture house
3 or houses, or a similar place or places for amusement and public per-
4 formance within this state, shall be and is hereby authorized to re-
5 ceive, use and render, or cause to be received, used and rendered within
6 this state, by the personal performance of artists, singers, musicians,
7 orchestras, bands, or actors, or by loud speakers, radio, sound produc-
8 tion or re-production apparatus or instrumentalities, or electrical
9 transcriptions, or by any other means of rendition whatsoever within
10 this state, by the personal performance of artists, singers, musicians,
11 copyrights of which are owned or controlled by any such combination
12 declared unlawful by Section 1 hereof, without the payment, to such
13 combination, or to its agents, representatives or assigns, of any license
14 fee or other exaction declared illegal and non-collectible by the terms of
15 this Act.

16 (B). When such theatre or theatres, moving picture house or
17 houses, or other places for amusement or performance within this state
18 is or are affiliated or under contract in any manner whatsoever with
19 any other person, firm or corporation furnishing in any form or man-
20 ner copyrighted musical compositions from outside this state, or sup-
21 plying such persons, firms, or corporations in this state with radio
22 broadcasts or electrical transcriptions, sound production instrumental-
23 ties or apparatus, or artists, performers, musicians, singers, players, or
24 orchestras, bands or other artists or talent, wherein or whereby copy-
25 righted vocal or instrumental musical compositions are privately or
26 publicly rendered for profit, then such person, firm or corporation out-
27 side this state shall be and is hereby prohibited from in any manner
28 charging or attempting to charge, or collecting or attempting to col-
29 lect within this state, from any such person, firm or corporation who
30 owns, leases, operates or manages such theatre or theatres, moving picture

ture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Sec. 6. Whenever any person, firm or corporation who owns, leases operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through

21 such affiliate or affiliates, then any defendant in such action may in-
22 terplead such affiliate or affiliates in such action; and any judgment
23 which may be rendered in favor of the copyright owner shall be paid
24 and satisfied by such affiliate or affiliates; and, if paid or satisfied by the
25 defendant user in this state, such defendant shall be subrogated in said
26 action or otherwise to all rights of the plaintiff in said judgment as
27 against said affiliate or affiliates, whether the latter is or are a party
28 or parties in said action or not; and in any event such affiliate or affil-
29 iates shall be liable to such user to the full extent of his liability to
30 such copyright owner, in the absence of any agreement to the contrary;
31 and any combination declared unlawful by Section 1 of this Act
32 which is the owner or proprietor of or controls the copyrighted vocal
33 or instrumental musical compositions, its agents or representatives
34 shall be and are hereby prohibited from suing for infringement, loss or
35 damage within the boundaries of this state, for the use or rendition
36 of such copyrighted vocal or instrumental musical compositions so
37 originating or emanating because such persons, firms or corporations
38 used, rendered or performed the same within this state; the use or
39 renditions by radio broadcast, radio re-broadcast or sound pro-
40 ducing instrumentalities or apparatus, or electrical transcription, or
41 by the personal performance of singers, players and musicians sent
42 into this state, or otherwise, of such copyrighted musical compositions
43 within this state in the manner set forth in this section, shall be con-
44 sidered, for the purpose of this Act, as intrastate business of this
45 state and subject to the control, regulation and prohibitions set forth
46 in this Act notwithstanding that such copyrighted musical composi-
47 tions originated or emanated from without this state.

Sec. 7. (A). Any person, firm or corporation within this state
2 who shall act as the representative of any combination herein declared
3 unlawful as defined in Section 1 hereof, shall, for the purpose of this
4 Act, be deemed an official representative and agent of such unlawful
5 combination and shall be construed to be doing business within this
6 state, and service of any process against such combination may be
7 had upon such representative or the agent of any such representative
8 as herein defined within this state; and when so served, such process

shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B). Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who act as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Sec. 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than \$5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Sec. 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party

15 aggrieved, because of the violation of any of the terms of this Act
16 anywhere within this state, shall proceed in the District Court in any
17 county in which all or any part of the offense or violation was com-
18 mitted, to institute action against any combination defined as unlaw-
19 ful by Section 1 hereof, and against the representatives or agents of
20 any such combination, either in a criminal action to enforce the pen-
21 alties hereof, or in a civil action to enforce all rights hereunder, or
22 to dissolve any such combination as declared unlawful by Section
23 1 hereof, or he may proceed by both civil and criminal actions; in
24 such action or actions, the plaintiff shall be the State of Nebraska;
25 and any interested party may, upon application, be granted leave to
26 intervene in such a civil action.

27 (D). The District Court shall, in such dissolution or other civil
28 suit, upon the application and intervention in said action of any
29 member, stockholder or other interested party of said unlawful com-
30 bination, adjudicate the ownership of any copyrighted vocal or instru-
31 mental musical composition theretofore owned or controlled by said
32 unlawful combination; and furthermore, such District Court shall
33 have and is hereby granted the power and authority to appoint a re-
34 ceiver and to issue injunctive and mandatory temporary and permanent
35 orders in reference to any of the issues involved in such action; and
36 any person, firm or corporation within this state who is a user in
37 any manner of any copyrighted vocal or instrumental musical com-
38 positions theretofore owned or controlled by such unlawful combina-
39 tion may, upon application, intervene in such action and therein have
40 adjusted, determined and adjudicated all rights for or against the
41 person, firm or corporation whom the Court shall finally determine
42 to be the owner or proprietor of such copyrighted vocal or instrumental
43 musical compositions; and said parties shall be permitted no other
44 remedy in any other court within the boundaries of this State, whether
45 the same be for damages, infringement or otherwise until final decree
46 has been had in said action determining the ownership and terms for
47 use of such copyrighted musical compositions.

Sec. 10. (A). Any person, firm or corporation within this state

aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his or its own name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect and final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Sec. 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case; and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant

18 or defendants to furnish and file such information as ordered.
19 copy of said order shall be mailed to each defendant at his or
20 last known address, which shall be deemed sufficient notice and service
21 upon said defendant or defendants; or the same may be served by
22 mail in the same manner upon each attorney of record for the defend-
23 ant or defendants, and when so served, the same shall be deemed
24 notice and service upon the defendant or defendants for whom said
25 attorneys appear of record.

26 (B). If said defendant or defendants shall fail to furnish plain-
27 tiff or his or its attorney, or file with the Clerk of the Court in which
28 the action is pending, said copy or copies of said documentary evidence,
29 facts, figures, records, books and data as set forth in said order within
30 the time specified in said order, the Court shall adjudge said defend-
31 ant or defendants guilty of contempt of court, and the Court shall assess
32 a fine of \$100.00 against such of the defendants for each and every
33 day that such defendant or defendants fails to comply with said order
34 and judgment shall from time to time be rendered therefor, and the
35 plaintiff may collect the same against the defendant or defendants with
36 6% interest thereon and the costs, including expenses and attorney
37 fees to be fixed by the Court, in the same manner as other judgments
38 are collected in this state. The Court shall find and determine when
39 the judgment is rendered what disposition shall be made of the proceeds
40 collected after the payment of costs, expenses and any attorney's fees
41 that may be allowed.

Sec. 12. If any section, sub-division, sentence or clause in this
2 Act shall, for any reason, be held void or non-enforceable, such de-
3 cision shall in no way affect the validity or enforceability of any other
4 part or parts of this Act.

Sec. 13. Nothing in this Act shall be construed as repealing any
2 other law or parts of laws in reference to any of the matters contained
3 in this Act; and the rights and remedies and provisions herein provided
4 shall be and are hereby declared to be cumulative to all other rights
5 remedies and provisions now provided under the laws of the State of
6 Nebraska.

Sec. 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.



[fol. 189] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WALTER S. FISCHER

Walter S. Fischer, being duly sworn, deposes and says:

I am President of Carl Fischer, Inc., one of the complainants herein, and have been associated with that company [fol. 190] for thirty-eight years. The firm was founded by my father in 1872.

I reside at Darien, in Fairfield County, State of Connecticut.

Carl Fischer, Inc. is one of the largest publishing houses of classical music in America, whose principal place of business has always been and still is in the City, County and State of New York.

Over the years it has published many thousands of musical compositions. At the present time a substantial portion of these is still being published and most of these compositions are protected by United States copyrights.

I have read the annexed affidavit made on behalf of Irving Berlin, Inc., one of the complainants, and believe that the statements therein contained with respect to the conduct of the music publishing business and the hardships that would be entailed if the State Statute of Florida were enforced, are true and correct, and apply with equal force to this complainant.

The catalogue of this complainant depends upon the value of the copyrights and the rights which the complainant enjoys under the Copyright Act.

Under the State Statute, each publisher would be required to specify legibly upon each copy of the copyrighted musical composition published by him, a specific selling price for all users including the public rendition for profit.

The State Statute effectively deprives this complainant and other copyright owners of the right to perform the copyrighted work publicly for profit given by Section 1E [fol. 191] of the Copyright Act. The obvious purpose of the Statute is to enable the copyright owner to obtain a share of the profit made from the performance of his work. At any time during the term of copyright, the copyright owner may grant absolutely or conditionally, or completely

withhold such right. He may fix his own terms." It is often to the advantage of my company and other publishers to sell sheet music only for private or non-profit public performance, and purchasers of the sheet music may freely use the work for these purposes. Under the State Statute I lose that right. I am compelled at once, upon the sale of the first copy of sheet music in the State of Florida, to give an unrestricted license to perform the work publicly for profit and to make other uses. It is impossible for me to print the price for all uses upon the sheet music, because if such a price would approximate adequate compensation for those uses, it would make the price for the sale of sheet music prohibitive, and my company and other publishers would have to discontinue the shipment of sheet music into the State of Florida. The sale of sheet music has at all times been kept separate and apart from the licensing of public performance for profit. Sheet music has always been sold to purchasers regardless of whether they wished to secure a license to perform it publicly for profit or not, and in like manner licenses for the public performance for profit have been issued regardless of whether the licensee had purchased the sheet music or not. The same practice has obtained in the sale of phonograph records and music rolls. The separability of these rights is recognized by Sec. 41 of the Copyright Act. But that separability without which the right of public performance for profit cannot [fol. 192] be enjoyed has now been completely destroyed by the State Statute.

With respect to the right of public performance for profit, no uniform fee can be fixed for all who choose to publicly perform for profit the particular copyrighted musical composition. It would be utterly impossible to print upon each copy of the musical composition the selling price for public performances for profit.

Even if the State Statute permitted the copyright owner to fix a separate price for each purchaser depending upon the extent of his proposed use of the musical composition in public performance for profit this would require printing on each musical composition the name of each establishment publicly performing for profit copyrighted music in that State, and the price to be charged for the public performance for profit in each such establishment. In the State of Florida, there are 367 establishments now having a license

from the Society to publicly perform for profit all the copyrighted musical compositions copyrighted by members of the Society and the members of affiliated societies.

The number of licenses and the establishments publicly performing copyrighted musical compositions in the State of Florida and elsewhere, is constantly changing.

The nature of the use in particular establishments changes from time to time. Such establishments are enlarged or made smaller. The nature of the performance may become more or less lavish. The number of people frequenting the place and observing or listening to the performance constantly changes. The investment of the owners in such establishments, as well as the ownership thereof, is constantly changing.

[fol. 193] This Statute would require the publishers of copyrighted music to fix a price upon the initial publication of the work. The purchase of a sheet of music would confer a license for a period of twenty-eight years, and a renewal period of the same length, and the price fixed on the initial publication would have to remain constant for a period of twenty-eight years, and renewal unless all copies of the musical composition printed especially for distribution and sale in the State of Florida, were periodically withdrawn and destroyed and new copies printed; properly reflecting the situation existing at the particular time.

Even though such an attempt were made to withdraw periodically all copies of musical compositions in Florida, it would serve no useful purpose, inasmuch as all users who had purchased copies of such compositions and had paid the price printed thereon, could enjoy the public performance for profit of such compositions for the balance of the copyright period of twenty-eight years and renewal.

The effect of the Statute is to nullify the right of public performance for profit granted under the Copyright Law, insofar as the same might otherwise be enjoyed in the State of Florida.

Furthermore, in order to attempt compliance with the Statute, it would be necessary to make a constant investigation of the number of places in Florida where the copyrighted works of this complainant are used or are likely to be used, in public performances for profit; which would entail the expense of maintaining a staff of investigators

[fol. 194] and would require the establishment of a permanent agency in the State, the expense of which would be far in excess of \$10,000.00 per year.

The composers, authors and publishers who are members of the American Society of Composers, Authors and Publishers, have, since 1914, adopted a method for the equitable distribution of all moneys received by the Society from the public performance for profit of the works created by the composer and author members of the Society and published by the publisher members, who, in most instances, are the owners of the copyright.

The scheme of the State Statute would require the publisher, who has the sole right to print and sell copies of the copyrighted musical compositions, to fix a price for all uses including the public performance for profit. This would impose a hardship upon the publisher.

All this trouble and expense and the legal complications which are known as well to the users of music as to the creators and copyright owners, are made necessary by this Statute, only, in an effort to free copyrighted works from the requirement of the Copyright Act, that such works shall not be publicly performed for profit except with the consent of, and appropriate payment to, the owners of such copyrighted works.

Complainant publishes standard and classical music as distinguished from popular music; its musical compositions [fol. 195] have a perennial appeal, and there is always a very substantial demand for them. It publishes orchestration and band music, chamber music, vocal and instrumental music, choral works, cantatas, symphonic works and books of instruction for all instruments, and musical compositions written and composed by eminent musicians, and expends moneys far in excess of \$10,000 per annum to advertise and exploit its musical works in the United States, and has expended over \$500,000, during the last sixty years, in advertising and exploitation. It expends far in excess of \$10,000 per year for arrangements, and employs many arrangers for the purpose of making various arrangements of its compositions.

The gross business done by this complainant has been very substantial for upwards of sixty years. For the year 1936, the gross business amounted to a substantial sum, far in excess of \$150,000, and for the past five years, it has averaged far in excess of \$100,000 per year.

Complainant's contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940, a copy of which is annexed to the complaint, was lawful in the State of New York, when made, and is presently in full force and effect and is of great value to this complainant; under this contract, this complainant received from the Society a sum in excess of \$50,000 during each of the past five years, and will continue to receive sums in [fol. 196] excess of \$50,000 for each year during the balance of said contract period, and the value of this contract to this complainant is in excess of \$200,000.

If complainant were to attempt to comb its entire catalogue and endeavor to ascertain a price for each use or all uses of each of its compositions, for each or all establishments in Florida, with respect to the many varied circumstances which must be considered in fixing such prices, a vast amount of research work would be entailed and complainant would be compelled to expend large sums of money, in my opinion, an amount in excess of \$25,000 and complainant would have to continue such expenditures for the purpose of fixing a price commensurate with changing conditions in a particular state.

If the name of any user of music in Florida were omitted, such user would have the right to perform publicly for profit complainant's musical compositions without making any payment whatsoever therefor, except paying the same price for the purchase of a copy of the musical composition that people are accustomed to pay who simply use the composition for private entertainment in their own homes.

Complainant also copyrights many of its musical compositions under Section 11 of the Copyright Act, and the rights and privileges which it possesses under said Act [fol. 197] would be interfered with by the enforcement of this State Statute.

Walter S. Fischer.

Sworn to before me this 21st day of January, 1938.

Marion L. Elkin, Notary Public, New York County.
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.
Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.
22, Reg. No. 9090. Commission expires March 30,
1939.

[fol. 198] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SAUL H. BORNSTEIN

Saul H. Bornstein, being duly sworn, deposes and says: I am the Treasurer of Irving Berlin, Inc., one of the complainants herein, and have been associated with that company [fol. 199] for 18 years.

I reside at No. 14 East 75th Street in the Borough of Manhattan, City and State of New York.

I have been in the music business for the past 20 years, and have a thorough and intimate knowledge of the business and a wide acquaintanceship with all the leading authors, composers and publishers, and am familiar with the customs and usages of the business and with the manner of its operation.

Irving Berlin, Inc. is one of the largest music publishing houses in America. It has been engaged in business for upwards of twenty years, and its principal place of business is in the City, County and State of New York.

This corporation has contracts with a great many prominent and successful authors and composers besides which it has the exclusive right to publish the works of Mr. Irving Berlin. Over the years, it has published and copyrighted thousands of musical compositions, many of which have been extremely successful.

The ownership in these musical compositions and in the copyright thereof constitutes the catalogue of Irving Berlin, Inc. The entire business of this company depends upon the size of the catalogue, its entertainment value, the prestige of the writers and composers, the public demand for particular compositions, the permanency of such demand, and other elements, all of which go to make up the value of the catalogue, and, of course, the value of the business. The entire value of the catalogue and the business depends [fol. 200] upon the right of Irving Berlin, Inc. to exercise all the exclusive rights granted to it under the Copyright Law with respect to these compositions. Anything that interferes with the right of this complainant to exercise the rights granted to it under the Copyright Act with respect to each and every one of these compositions or to the catalogue as a whole, and with respect to each of the separate

uses recognized by and protected under the Copyright Law adversely affects the business of the complainant.

During the many years that this complainant has been in business, it has expended large sums of money in exploiting its compositions. Each year it has expended far in excess of \$25,000 for the purpose of making these compositions well known, popular and pleasing to the public in an effort to create a demand for its catalogue. In the aggregate, this complainant has expended far in excess of \$250,000 for that purpose.

In 1936, this complainant entered into a renewal contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940 (which is identical in form with the contract Exhibit "B" attached to the complaint herein). That contract was lawful in the State of New York when it was made, and is presently in full force and effect, and is of great value to this complainant. Under that contract this complainant received, in 1936, a sum of money in excess of \$50,000 from the Society by way of royalties; and this complainant has received a sum many times in excess of \$50,000 from said Society during each of the past five years, and will continue to receive sums in excess of \$50,000 yearly for the balance of said [fol. 201] contract period and the value of this contract to complainant is in excess of \$200,000.

The catalogue of this complainant has a present value, in my opinion, far in excess of \$1,000,000 based upon the factors considered in fixing the value of a catalogue such as the size and extent of the catalogue, the previous earnings of the corporation, the amount received from the said Society, the gross business done by the corporation, and the amount received by other prominent publishing firms upon the sale of their catalogues within the last seven or eight years.

The State Statute attempts to nullify the complainant's existing contract with the American Society by compelling this complainant to forego and surrender its right to separately license the public performance for profit of its copyrighted musical compositions, and requiring this complainant to grant to all purchasers of a copy of such musical compositions a license to perform publicly for profit such compositions merely upon the payment of the sum fixed for the sale of the sheet of music.

Since the complainant's contract with the said Society is a valid and subsisting contract, the complainant is in no position to come into the State of Florida free of any combination and comply with the said Statute. It is in a position where it is declared by the State of Florida to be operating illegally and unlawfully against its Statute.

To attempt to ascertain the information necessary to affix the price of uses and to stamp the same upon each sheet of music to collate it and to keep it accurate and up to date, would involve this complainant in an initial expenditure far in excess of \$25,000, and in annual expenses thereafter [fol. 202] in excess of \$10,000, because it would entail the services of a large staff of clerks and investigators.

It is to be borne in mind that with respect to these musical compositions, there are arrangements being made from time to time. A popular composition has not only a piano arrangement, but it has an orchestral arrangement,—a separate arrangement for each instrument of the orchestra. Very frequently, new arrangements of very popular compositions are made from time to time, particularly, with respect to time and rhythm; sometimes quartettes, trios and duets are arranged; sometimes arrangements for special vocal parts. Each of these arrangements is copyrighted separately, as is the custom in the music business, and as required by the Copyright Act, and each arrangement may have a separate history with respect to license, ownership, restrictions and foreign rights, as well as renewals.

Complainant would have to fix a separate price for all uses of each copyrighted arrangement; for example, there would have to be a price for a piano arrangement, for a violin arrangement, for a cello arrangement, and other instruments of the orchestra, often ranging as high as forty different arrangements. There would be no way by which the complainant could issue a single license for the performance by an orchestra of ten, as distinguished from a performance by an orchestra of fifty. Obviously the compensation to the copyright owner should be different in one than it is in the other.

In actual practice it is impossible to fix a price for a particular performance of a particular copyrighted musical [fol. 203] composition, and it is for that reason that the issuance of blanket licenses has been adopted as the only

feasible way of licensing the public performance for profit of musical compositions.

There are all sorts of uses and all sorts of places where the uses are made. All of these factors must be taken into consideration for the purpose of arriving at a true estimate of the use value of a composition. There must be constant investigation into the manner in which a particular composition is used, including investigation of the places where the music would be used, the nature of the use, the character of the artists involved in the performance, the extent of the use, the nature of the audience reached. To properly ascertain such information a very considerable sum of money would have to be expended by the complainant with respect to each of its musical compositions, and the cost of so doing, would, in my opinion, far exceed \$25,000.

Moreover, there is a vast difference between the value of the various songs in the catalogue. Some are currently popular, some are not; and it would be a very difficult matter, in fact impossible; to ascertain with any degree of certainty, a true use value for each of our compositions.

Under the State Statute, it is mandatory that the complainant fix a price for all uses including the public performance for profit, upon each of its compositions. That would mean that the complainant would be compelled to comb its entire catalogue and endeavor to estimate a use value on each of its compositions.

[fol. 204] This would require the services of musical experts, as well as legal experts, and would require a vast amount of research work and the expenditure of large sums of money; in my opinion, an amount far in excess of \$25,000.

Furthermore, to enforce the State Statute would work a terrific hardship with respect to a great many musical compositions now owned by the complainant. For example: the complainant frequently copyrights musical compositions which it does not publish for a long time thereafter. This is done as a matter of sound business judgment, and is a recognized custom in the trade; and Section 11 of the Copyright Act recognizes the necessity for securing copyright on these compositions before publication, and provides that this may be done.

The State Statute takes away from the complainant its control of its own business. It does not permit the complainant to exercise control over its business, but permits

users in Florida to perform publicly for profit complainant's musical compositions in such users' establishments in perpetuity, for a price fixed under circumstances not within the knowledge, and beyond the control of complainant.

The complainant, having copyrighted a work under Section 11, often refrains from publishing the song to preserve other property in addition to the song. Many songs are performed, for the first time, as part of an elaborate musical show, musical comedy or operetta and works of similar nature. Obviously, such dramatic works, some of which represent an expenditure of hundreds of thousands of dollars in cost of production, must be protected. If the music is [fol. 205] indiscriminately broadcast and performed prior, or during the run of a production, it means that the public will have been surfeited with it and the demand for the song will have been exhausted. Thus the production in which the song appears will lose appeal and may become a failure.

For the foregoing reasons, the members of the American Society including complainant reserved the right to restrict from radio broadcasting, musical compositions currently being played in important productions.

Under the State Statute of Florida, it would be impossible to protect a musical production whose cost to the producer is sometimes as great as \$300,000 (cost of producing such musical plays is invariably between \$200,000 and \$300,000); and consequently, not only the complainant, but producers of plays using its musical works throughout the country, would be at the mercy of the user of a particular piece.

Very often the "hit" number of an important production is a song which complainant owns, and which has been interpolated in such a musical production as a separate number. For this the complainant receives special compensation. But that is done only when the complainant is able to assure the producer that the song will not be broadcast or otherwise performed during the run of the show, and possibly, even during subsequent periods, when motion pictures or road-shows based upon such production, are in progress. That valuable right is likewise destroyed by the State Statute for the reasons above explained.

The only alternative left to complainant under the Nebraska and Florida Statutes is to withdraw from the channels of interstate commerce all sheets of music which

[fol. 206] are now sent to those states and which complainant would continue to send to those states but for the provisions of those State Statutes and the reasons above stated.

Under the State Statute, if this complainant or the Society should give a license to a broadcaster in New York or in any other State, to broadcast from that particular station a particular copyrighted composition, all stations in Florida would have the right to re-broadcast such a performance without any license from the copyright owner and without being subject to the Copyright Laws of the United States under which such a user would be an infringer of complainant's copyright.

Complainant, standing alone, is helpless to detect infringements, throughout the country, of its copyrights. Its songs may be performed simultaneously in over 30,000 establishments throughout the United States, and the cost of detecting infringement and bringing suit would far exceed any royalties that it might collect, and certainly would exceed \$25,000 for the State of Florida alone. Infringers habitually challenge the title of complainant, the originality of the work, deny giving performance, deny performance was for profit and in other ways attempt to evade liability. They manoeuvre for delay and often succeed in postponing trials for three and four years. In the meantime, many establishments, thus sued, go out of business, and complainant is left without remedy. Such defense and such tactics require vigorous and able prosecution by skillful lawyers, well versed in the law of copyrights. This likewise entails large expense which can hardly be compensated for in the statutory damages and modest counsel fees awarded in cases where judgments are obtained and collected.

[fol. 207] It is only through an organization like the Society that these rights of complainant may be adequately protected.

Saul H. Bornstein.

Sworn to before me this 21st day of January, 1938.
 Marion L. Elkin, Notary Public, New York County.
 N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.
 Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.
 22, Reg. No. 9090. Commission expires March 30,
 1939.

[fol. 208] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GUSTAVE SCHIRMER

Gustave Schirmer, being duly sworn, deposes and says:

I am Secretary of G. Schirmer Inc., one of the complainants herein, and have been associated with that company [fol. 209] for over thirty years.

I reside at No. 812 Park Avenue, in the Borough of Manhattan, City and State of New York. G. Schirmer Inc., is one of the largest publishing houses of classical music in America, whose principal place of business has always been in the City, County and State of New York.

Over the years it has published many thousands of musical compositions. At the present time a substantial portion of these is still being published and most of these compositions are protected by United States copyrights.

I have read the annexed affidavits made on behalf of Carl Fischer, Inc. and Irving Berlin, Inc., complainants, and believe that the statements therein contained with respect to the conduct of the music publishing business and the hardships that would be entailed if the State Statute were enforced, are true and correct, and apply with equal force to this complainant.

Complainant, G. Schirmer Inc. publishes standard and classical music as distinguished from popular music, and its musical compositions have a perennial appeal; there is always a very substantial demand for them. It publishes choral works, cantatas, symphonic works, books of instruction to music students and musical compositions written and composed by eminent musicians; it expends far in excess of \$10,000 per annum to advertise its musical works in the United States, and has expended over \$100,000 during the last thirty years in advertising. It expends in excess of \$10,000 per year for arrangements, and employs many [fol. 210] skilled and experienced arrangers for the purpose of making various arrangements of its compositions.

The gross business done by this complainant has been very substantial for upwards of thirty years. For the past five years it has averaged in excess of \$150,000 per year.

Complainant's contract with the American Society of Composers, Authors and Publishers, which expires on December 31, 1940 (which is similar to the contract of Carl

Fischer, Inc., annexed to the complaint herein), was lawful in the State of New York, when made, is presently in full force and effect, and is of great value to this complainant; under this contract, this complainant received from the Society a sum in excess of \$50,000 during each of the past five years, and will continue to receive sums in excess of \$50,000 for each year during the balance of said contract period; and the value of this contract to this complainant is in excess of \$200,000.

If this complainant were to attempt to comb its entire catalogue and endeavor to ascertain and fix a price on all the uses or on each use of each of its compositions, a vast amount of research work and investigation would be entailed, and complainant would be compelled to expend large sums of money, in my opinion, in excess of \$25,000. Even after the expenditure of such an amount, there would be no assurance that the data would be complete or accurate and it would have to be constantly revised to meet changing conditions in each State.

This complainant also copyrights many of its musical compositions under Section 11 of the Copyright Act, and [fol. 211] the rights and privileges which it possesses under said Act would be interfered with by the enforcement of this State Statute.

Gustave Schirmer.

Sworn to before me this 21st day of January, 1938.

Marion L. Elkin, Notary Public, New York County.

N.Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.

Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.

22, Reg. No. 9090. Commission expires March 30,

1939.

[fol. 212]. IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ANNE PAUL NEVIN

Anna Paul Nevin, being duly sworn, deposes and says:

I am one of the complainants herein, and the widow of Ethelbert Nevin, who departed this life in 1901. He was [fol. 213] a pianist and composer, and his memory is one of the bright spots in American music. He was born in 1862 in Edgeworth, Pa., and in his comparatively short life

he composed some of the most famous songs in this nation. To have done nothing else than to have composed "The Rosary" and "Mighty Lak a Rose" would have been sufficient to have established his reputation.

In his lifetime, my husband never received any money whatever from the public performance for profit of his copyrighted musical compositions. It was not until I joined the American Society, long after his death, that I began to benefit from the royalties from the licensing for public performance for profit on his compositions.

With respect to many of the copyrights, the original term has expired and I have renewed the term of the copyrights in my name, as his widow, pursuant to the provisions of the Copyright Act.

I have been receiving substantial royalties from the Society, and since 1928 I have received in excess of \$4,000 each year from the Society as my participation in the licensing for public performance for profit of my husband's songs. This is a very substantial sum of money to me, and were it not for the Society I would not be in receipt of anything for these public performing rights. I depend for my livelihood chiefly upon this income from the Society.

Herewith is a list of the various works that my husband wrote from 1874 down to the time of his death, as well as the posthumous works published after his death, with the years in which they were published:

[fol. 214]	1874	
Lilian Polka		Piano
	1880	
Apple Blossoms		Song and Dance
	1881	
The Lovers (In the garden were leisurely walking)		Song
The Milk Maid (Shame upon you, Robin)		Song
	1886	
I once had a sweet little doll, dears		Song
Stars of the summer night		Song
Summer Longings (Ah! My heart is weary waiting)		Song
When all the world is young, lad		Song
	1887	
Bed-time Song (Sway to and fro in the twilight gray)		Song
Cradle Song. (Sleep, baby, sleep)		Song

1888

Op. 2, Sketch Book:

- | | |
|---|-----------------------------------|
| 1. Gavotte..... | Piano |
| 2. Im wunderschönen Monat Mai ('Twas in the lovely month of May)..... | Song |
| 3. Love Song..... | Piano |
| 4. Du bist wie eine Blume (Oh! fair, and sweet and holy)..... | Song |
| 5. Berceuse..... | Piano |
| 6. Lehn' deine Wang (Oh! let thy tears fall fast with mine)..... | Song |
| 7. Serenata..... | Piano |
| 8. Oh! that we two were maying..... | Song |
| 9. Valse Rhapsodie..... | Piano |
| 10. In winter I get up at night..... | Song |
| 11. Of speckled eggs the birdie sings..... | Song |
| 12. Dark brown is the river..... | Song |
| 13. The night has a thousand eyes..... | Mixed chorus and violin obbligato |

Op. 3, Three Songs:

- | | |
|---|---------------------------------------|
| 1. Deep in a rose's glowing heart..... | Song with violin and cello obbligati |
| 2. One spring morning..... | " " " |
| 3. Doris..... | " " " |
| Serenade (Good-night, good-night, beloved)..... | Song |
| May Day Dance..... | Unison chorus, with piano 4-hand acc. |

[fol. 215]

1889

Op. 4, Five Songs:

- | | |
|--|--|
| 1. Herbstgefühl (Autumn sadness)..... | Song |
| 2. Chanson des Lavandieres (What care I, unwilling)..... | Song |
| 3. 'Twas April..... | Song |
| 4. Raft Song (From upwards my raft drifts down)..... | Song |
| 5. Before the daybreak..... | Christmas Carol |
| The Earth has Grown Old..... | Christmas Carol |
| Everywhere, Everywhere, Christmas Tonight..... | Christmas Carol |
| Wynken, Blynken and Nod..... | Solo and chorus of mixed voices with piano 4-hand acc. |

1890

Op. 6, Three Duets for the Piano:

- | | |
|-----------------------|-------------------|
| 1. Valse Caprice..... | Piano, four hands |
| 2. Country Dance..... | " " " |
| 3. Mazurka..... | " " " |

Op. 7, Four Pieces:

- | | |
|--|-----------------|
| 1. Valzer Gentile..... | Piano |
| 2. Slumber Song..... | Piano |
| 3. Intermezzo..... | Piano |
| 4. Song of the Brook..... | Piano |
| Jesu, Jesu, Miserere..... | Sacred Song |
| The Silent Skies are Full of Speech..... | Christmas Carol |
| Nunc Dimittis..... | Mixed Voices |
| Benedictus..... | Mixed Voices |
| Jubilate..... | Mixed Voices |

1891

- Op. 8, 1. Melody..... Violin and Piano
 2. Habanera..... Violin and Piano
 Une Vieille Chanson (If a lovely lawn there be)..... Song
 Barcarolle (The crimson glow of sunset fades)..... Men's Voices

Op. 12, Five Songs:

1. A Summer Day..... Song
 2. Beat upon mine little heart..... Song
 3. In a Bower..... Song
 4. Little Boy Blue..... Song
 5. At Twilight..... Song

Op. 13, Water Scenes:

1. Dragon Fly..... Piano
 2. Ophelia..... Piano
 3. Water Nymph..... Piano
 4. Narcissus..... Piano
 5. Barcarolle..... Piano

[fol. 216]

1892

- The Rhine and the Moselle..... Chorus of Men's
 Voices

Op. 16, In Arcady:

1. A Shepherd's Tale..... Piano
 2. Shepherds All and Maidens Fair..... Piano
 3. Lullaby..... Piano
 4. Tournament..... Piano

Op. 17, Three Songs:

1. Hab' ein Roslein (The Rosebud)..... Song
 2. Le Vase Brise (The Vase)..... Song
 3. Rappelle-toi (Remember well)..... Song

Op. 18, Two Etudes:

1. In the form of a Romance..... Piano
 2. In the form of a Scherzo..... Piano

1893

- Barcarolle..... Violin and Piano
 Evening Song..... Chorus of Mixed
 Voices

- My Love..... Chorus of Mixed
 Voices

Op. 20, A Book of Songs:

1. A Fair, Good Morn..... Song
 2. Sleep, little Tulip..... Song
 3. Ev'ry Night..... Song
 4. Airly Beacon..... Song
 5. When the Land Was White with Moonlight..... Song
 6. A Song of Love..... Song
 7. Nocturne (Up to her chamber window)..... Song
 8. Dites-moi (Tell me)..... Song
 9. Orsola's Song..... Song
 10. In the Night..... Song
 When Christmas Comes..... Christmas Carol

1894

The Merry, Merry Lark	Song
La Vie (Life)	Song
Ti Salut (Thine my greeting)	Song

1896

Op. 21, May in Tuscany:

1. Arlecchino	Piano
2. Notturmo (In Boccaccio's Villa)	Piano
3. Barchetta	Piano
4. Misericordia	Piano
5. Il Rusignuolo (In my neighbor's garden)	Piano
6. La Pastorella (Montepiano)	Piano

Op. 22, Two Songs:

1. Rechte Zeit (Time enough!)	Song
2. Madel, wie bluht's (Maiden, how sweet)	Song

[fol. 217]

1898

The Rosary	Song
Life Lesson (There, little girl, don't cry)	Song
My Love's Waitin'	Song

Op. 25, A Day in Venice:

1. Alba (Dawn)	Piano
2. Gondolieri (Gondoliers)	Piano
3. Canzone Amorosa (Love Song)	Piano
4. Buona Notte (Good Night)	Piano

March of the Pilgrims, for the Knight Templars. Piano

1899

Op. 28, Songs from Vineacre:

1. A Necklace of Love	Song
2. Sleeping and Dreaming	Song
3. The Dream-maker Man	Song
4. Ein Liedchen	Song
5. My Desire	Song
6. The Nightingale's Song	Song
7. La Lune Blanche	Song
8. Ein Heldenlied	Song

Op. 29, Captive Memories. Bar. Solo, Solo Quartet and Reader; Song Cycle

Op. 30, En Passant:

1. A Fontainebleau	Piano
2. In Dreamland	Piano
3. Napoli	Piano
4. At Home (A June Night in Washington)	Piano

1900

Memorial Day. Mixed Voices

Posthumous Works

1901

An African Love Song	Song
Mighty lak' a rose	Song
To Anne	Song
At Rest	Song
The Woodpecker	Song
The Four Seasons	Mixed Voices

1902

O'er Hill and Dale	
'Twas a lover and his lass	Piano
The Thrush	Piano
Love is a-straying, ever since maying	Piano
The Lark is on the wing	Piano
The Quest	Cantata

1907

Sweetest Eyes were ever seen	Song
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[fol. 218]

1909

Wedding Morn	Song
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1913

Marguerites	Song
Rain Song	Song
I Fear Thy Kisses, Gentle Maiden	Song

A very complete account of my husband's life and works is to be found in the book entitled "The Life of Ethelbert Nevin" by Vance Thompson, published and copyrighted by the Boston Music Company in 1913.

If the State Statute is enforced against me, I will lose the moneys that I receive from the Society, and will be without means of livelihood. I am 70 years of age, and I ask the protection of this Court of Equity to preserve me in my declining years against want and poverty, in memory of a man who has enriched this nation with his genius.

As evidence of the perennial appeal of my husband's works, "Mighty Lak' a Rose" was reported performed over the radio in 1935 over 6,000 times and "The Rosary" was reported performed over the radio that year over 3,000 times, including performances in the State of Florida. I have obtained these figures from the record furnished to me by the Society, which in turn is furnished to it by the two principal radio networks. It does not purport to represent all of the actual performances given by radio

broadcasters throughout the country. I have frequently heard many other songs of my husband's performed over the radio, but have found no report made of them by the broadcasters. These songs have all been and are now being performed with- the State of Florida.

Nevertheless, from these meagre reports it is apparent that the radio broadcasters are making a very substantial [fol. 219] use of my husband's songs. Hotels, motion picture theatres, cabarets and dance halls make no record, so far as I know, of public performances of musical compositions, including my husband's, so that it is impossible to estimate the extent of such use. Alone and unaided, it would be impossible for me to license the public performance for profit of my husband's compositions. I have no financial resources for that purpose; I could not engage lawyers or investigators throughout the country, and I would be utterly helpless.

It is for that reason that I joined the Society, knowing that in the combined strength of those similarly situated, we could protect the public performance for profit of our works against piracy and infringement.

If the State Statute should be enforced, it would make it impossible for the Society to operate in that State, and I, and others similarly situated, would be in the same position that my husband was in at the time of his death.

The practical effect of the State Statute is to give to selfish and powerful groups the right to exploit, without compensation, my husband's works and the works of other authors and composers.

The Copyright Statute carefully provided that the widow of an author was to have the first right to renew the original term of copyright. It was the public policy of the Government of the United States, realizing that authors pay much more attention to the creation of their works than to the business of obtaining money therefrom, to protect the widows and families of authors by that provision of the Copyright Act. That beneficent provision and public policy of the Government would be utterly destroyed by the State Statute.

[fol. 220] As the initial terms of the respective copyrights in the works of my late husband expire, the renewal rights vest in me, and I have exercised such rights with respect to certain compositions and am continuing and will continue

to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works for limited periods or for the balance of the term of copyright.

Under the State Statute, this right is denied to me. I must grant to my publisher, not only the right of publication, but all other rights under the copyright, since he is given the sole power to fix the value and price of all uses including the public performances for profit of my copyrighted works in the State of Florida.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will seriously impair the value of my existing rights in copyrights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Anne Paul Nevin.

Sworn to before me this 21st day of January, 1938.
Marion L. Elkin, Notary Public, New York County,
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx
Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk.
No. 22, Reg. No. 9090. Commission expires March
30, 1939.

[fol. 221] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF DEEMS TAYLOR

Deems Taylor, being duly sworn, deposes and says:

I am a composer and one of the complainants herein.

[fol. 222] I reside at Stamford, Connecticut.

I was formerly a music critic with the New York World, and have for several years past devoted myself almost exclusively to the composition of serious music.

In 1913 I wrote "The Siren Song", a symphonic poem which received a prize from the National Federation of Musical Clubs. And in addition to "Through the Looking

Glass" (a suite from Lewis Carroll's 'Alice In Wonderland', mentioned in the complaint). I also composed such choral works as "The Chambered Nautilus" and "The Highwayman" and a song cycle entitled "The City of Joy"; I also composed "The Portrait of a Lady", a symphonic poem "Jurgen" and a suite "Circus Day". I composed two grand operas "The King's Henchman" and "Peter Ibbetson", both of which were produced in the City of New York at the Metropolitan Opera House.

I also do a great deal of work upon the radio as a commentator, particularly in conjunction with the Philharmonic Symphony Orchestra.

A reference to my life and works is to be found in The New Encyclopedia of Music and Musicians by Waldo Selden Pratt (the MacMillan Company, 1935), and in An Outline of the History of Music by Karl Nef (Columbia University Press, 1935).

I am composing musical works at the present time and hope to continue to do so for the balance of my life.

My livelihood depends upon my ability as a composer, critic, reviewer and commentator and upon the demand for my works with the public.

[fol. 223] In the year 1930, I became a member of the American Society of Composers, Authors and Publishers, and for each of the past four years, I have received annually in excess of \$3,000 from said Society for the right which I gave to it to license users of music to publicly perform for profit my musical works and expect to receive a sum in excess of \$4,000 annually for the balance of my contract with the Society and future contracts with it; the value of my contract with the Society is in excess of \$15,000.

The amount that I receive from the Society is a very substantial part of my annual income. If I were required to issue individual licenses for the public performance of my works for profit throughout the United States, it would require engaging a large corps of employees, a large corps of investigators and accountants, lawyers and experts who would be qualified to determine the value of a particular use of a particular one of my musical compositions in a particular establishment. Considering that there are 30,000 establishments throughout the country, any one of which might perform all or part of my works without notice to me, the burden imposed would compel me to completely forego the revenue that I receive at present from the public perform-

ance of my compositions, since it would cost me more than \$5,000 to comply with the laws of the State of Florida, where there are more than 390 users of copyrighted musical works.

My annual income by way of royalties from the publishers of my musical compositions has averaged for the past ten years in excess of \$500.00. I have received mechanical royalties for the use of my works in conjunction with phonograph records, piano player rolls at an average sum each in [fol. 224] excess of \$100 for the same period.

It has been my experience, as well as the experience of other composers in the country, that all users of music would pay the composer nothing for the public performance for profit of his music unless he were in a position to enforce his rights. Singly and individually, I have never been in such a position and can never be in such a position, nor can any other writer or composer in the United States be in such a position. It has been necessary to join the Society in order to prevent unlimited piracy of our works and in order that we may earn our livelihood and be repaid for the product of our brain and creative faculties.

The Statute attempts to place me and other composers and writers, as well as publishers, in the same position that we were all in prior to the formation of the Society in 1914, when composers, authors and publishers in this country received nothing from the public performance for profit of their musical compositions. This is accomplished in an indirect manner under the Statute, by penalizing me and others similarly situated if we join together to prevent piracy and to protect our interests. This is sought to be accomplished by imposing conditions which cannot reasonably be met, and the penalties for our non-compliance are quite drastic. As a matter of fact, I cannot meet the demands of the State Statute because I am now a member of the Society, and since I have a valid, subsisting and binding contract with the Society, which is good until December 31, 1940, I cannot breach it.

[fol. 225] The fixing of prices for my compositions would violate my contract with the Society because that contract is a relinquishment by me of all rights whatsoever for the limited period of the contract, with respect to the licensing of the public performance for profit of my musical compositions.

When I composed my musical compositions and secured copyright thereon, or permitted a publisher, in some instances, to secure copyright thereon (reserving other rights to myself), I did so with the knowledge that I would be given certain exclusive rights with respect to my works for a limited period and that the rights flowing from the purchase or sale of the material object copyrighted were separate and distinct from rights under the copyright itself and that after the expiration of that period as fixed by Statute, all of my works would fall in the great reservoir of the public domain to be enjoyed free by the public thenceforth. That to my way of thinking was the purpose and spirit of the Copyright Act.

Encouraged by that Act, I have composed my works in the hope and expectation that I can during my lifetime obtain sufficient remuneration from my labors to support myself and my dependents. The State Statute deliberately flouts this purpose and destroys my expectations, because it at once seeks to place the public performance for profit of my musical compositions in the hands of all users in the State of Florida who may use them at will and pay me a sum to be fixed in advance, which sum cannot adequately be measured in proportion to the true value of my compositions.

[fol. 226] The State Statute was not enacted in the public interest. The Copyright Act itself has taken care of the true public interest, and it has provided in Section 28 that all performances of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, may be given free of any royalties, provided the performance is given for charitable or educational purposes and not for profit.

The selfish group of radio broadcasters and motion picture theatre owners operating in the States of Nebraska, Montana, Washington, Florida and Tennessee, who have sponsored this iniquitous bill, do not come within this section of the Copyright Act. Theirs is not a public interest but a selfish, private interest. They wish to enjoy the fruits of my labors for a pittance and deprive me of the ability to maintain myself for the purpose of creating music. They

are not acting in the public interest, and the State Statute was not created in the public interest.

To demonstrate how absurd it is to even attempt to fix a price for all uses of any of my musical compositions and those of others similarly situated, the Copyright Statute itself, recognizing that there is no way of proving the damage for the violation by pirates of musical compositions, fixes a minimum damage of \$250 for the piracy of such compositions. Congress in enacting this Statute, as I have been informed by eminent counsel, realized that such substantial damages are necessary in order to deter users from [fol. 227] wilfully infringing such works. The only purpose of compelling an author to fix a price for all uses of his composition can be to evade the provision for minimum statutory damages and to grant an involuntary license so that the copyright owner who detects a particular infringement of his work can recover only a nominal sum, which would hardly compensate for the cost of investigating the infringement, let alone the counsel fees and other expenses necessarily involved.

As the initial terms of the respective copyrights in my works expire, the renewal rights vest in me, and I have exercised such rights with respect to certain compositions and am continuing and will continue to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works for limited periods or for the balance of the term of copyright.

Under the State Statute, this right is denied to me. I must grant to my publisher, not only the right of publication, but all other rights under the copyright, since he is given the sole power to fix the value and price of all uses of my copyrighted works in the State of Florida.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will seriously impair the value of my existing rights in copy-[fol. 228] rights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Deems Taylor.

Sworn to before me this 21st day of January, 1938.
 Marion L. Elkin, Notary Public, New York County.
 N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx
 Co. Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk.
 No. 22, Reg. No. 9090. Commission expires March
 30, 1939.

[fol. 229] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ELLA HERBERT BARTLETT

[fol. 230] UNITED STATES OF AMERICA,
 Southern District of New York,
 State and County of New York, ss:

Ella Herbert Bartlett, being duly sworn, deposes and says:

I am one of the complainants herein, and the daughter of the late Victor Herbert, who has been referred to by music critics and by the public generally, as the leading and most gifted composer of music this country has ever had.

My late father devoted his life to music and to the musical profession. He went through many struggles and hardships in his younger days, and when success smiled upon him, he tried to help the writers and composers of America.

With the growth of the amusement and entertainment field, early in the twentieth century, my father realized that something would have to be done to obtain for these writers and composers adequate recompense for their labors and genius. He saw entertainment developing along the lines of pretentious cabarets, night-clubs and supper-clubs. He saw the restaurants presenting elaborate forms of musical entertainment, in addition to food. Yet, from none of these sources did a single penny come to the writer or composer.

My father was aroused by this injustice, and, in conjunction with other celebrated musicians, writers, composers and publishers of his day, he helped to organize the American Society of Composers, Authors and Publishers for the protection of the performing rights of those who created and published the music of the Nation. The test suit which won legal recognition of the rights of authors and composers was brought in my father's name—Victor Herbert vs. Shanley Co., 242 U. S. 591.

[fol. 231] Although my father served as a director and an officer of the American Society, he never asked for or received any compensation.

After his death in 1924, I was admitted to membership in the American Society, and have been a member continuously since said time. I have participated in the royalties derived annually by the Society from performances of works composed by my father, and I have received, since 1924, varying amounts, averaging in excess of \$4,000.00 per year. In the year 1936, I received by way of royalties a sum in excess of \$9,000. I shall receive at least an equal amount from the Society this current year, unless the State Statute is enforced, in which event I shall suffer loss of this revenue. Were it not for the American Society, I would not receive any compensation for the public performance for profit of the individual numbers composed by my father.

My father was a very prolific composer. It would be almost impossible to set down here a complete list of his works. He wrote a great many operettas, light operas and musical comedies, the principal ones being:

M'lle. Modiste
Naughty Marietta
The Century Girl
Old Dutch
The Cinderella Man
Prince Ananias
The Wizard of the Nile
Serenade
Idol's Eye
Cyrano de Bergerac
The Ameer
Singing Girl
Viceroy
Dolly Dollars
Babette
Tattooed Man
Wonderland
It Happened in Nord-
land
Song Birds
Camille
Prima Donna

Red Mill
Sweet Sixteen
Duchess
Only Girl
Princess Pat
Enchantress
Lady of the Slipper
Velvet Lady
Eileen
The Debutante
The Madcap Duchess
Madeleine
Natoma
Sweethearts
My Golden Girl
Girl in the Spotlight
Orange Blossoms
Dream Girl
Angel Face
Her Regiment
Oui Madame

[fol. 232] From time to time, various publishers acquired the publication rights to my father's works; the two principal firms that published his music were M. Witmark & Sons and G. Schirmer, Inc.

In most instances my father reserved to himself all performing rights, both dramatic and non-dramatic, in his works, as appears from typical contracts which are annexed hereto as Schedules VI and VII.

In addition to the dramatico-musical works enumerated above, my father composed a great number of musical compositions, some of which achieved tremendous popularity. There were waltzes, symphonic poems, suites, lieder and other pieces. I need mention only a few:

The Whiteman Suite
Suite Romantique
Suite Columbus
Fleurette
Souvenir
Sunset
Devotion
Dream On (Indian
Melody)
McKinley March
22nd Regiment March
Irish Rhapsody
Al Fresco
Heart Throbs
The Belle of Pittsburgh

Badinage
Indian Summer
Pan Americana
Habanera
Yesterthoughts
American Fantasia
Valse a la Mode
American Rose Waltz
Christ is Risen
Air de Ballet
Woodland Fancies
Punchinello
Star Light Waltz
Forebodings

These compositions are played wherever music is sung or played in the United States, and famous popular songs from my father's dramatico-musical works, as well as other, separate compositions have been played in the State of Florida for a great many years. They are part of the musical culture of that State, and wherever concerts are given, and whenever, during a great many years last past, an important hour has been broadcast over the radio in the State of Florida, my father's works have been included.

My father rarely granted to a publisher of his works all the rights in a particular copyrighted musical composition. [fol. 233] As a rule, he reserved to himself the performing rights, both dramatic and non-dramatic. The

publisher merely has the right to make and sell copies of the respective musical works composed by my father.

Under the Florida Statute, the publisher of sheets of music and the manufacturer of phonograph records and music rolls would not only have the right, but the duty, to fix the price and to collect for the public performance for profit, as well as for all other uses of these copyrighted works. This would be an impairment of the obligation of these contracts and an invasion of my rights under these copyrights, and it would seriously interfere with, and reduce the compensation which I have been receiving from licensing and disposing of other rights in the copyrighted works, such as the non-dramatic, dramatic performing rights, motion picture rights, the right to make arrangements and adaptations, to make other versions of the works, to make records and music rolls as well as to license, separately, the other forms of uses recognized by and granted under the Copyright Law of the United States.

There is a well known distinction between non-dramatic and dramatic performances of copyrighted works. Each of the operettas written by my father is composed of a number of individual musical compositions.

My contract with the Society is an exclusive license to give non-dramatic public performances for profit of these separate musical compositions, and the Society, in turn, licenses users to give such performances. The rights granted to the Society, and in turn licensed by it, are known as the "small performing rights". The right to perform an entire operetta, or to give a dramatic performance of a combination of any of the songs constituting such operetta [fol. 234] is known as a "grand right", and this right is not granted to or licensed by the Society.

Under the Florida Statute, a user in that State could buy copies of the separate musical compositions or phonograph records thereof constituting an operetta, and upon payment of the price fixed for each such sheet of music or record the user could give a performance of the entire operetta without compensating me for such a performance, which would be the performance of a dramatico-musical composition.

The Copyright Law protects me against such performances which are made in public, whether they are for profit or not.

In this respect, this valuable right of performance of a dramatico-musical work differs from the limited right of

performance of separate musical compositions, which rights are only protected when the performance is both public and for profit.

Many rights and the many contracts which are involved in a particular copyrighted composition, and which would make it impossible for either myself or my publishers to fix a particular price for a particular use of such composition, are exemplified as follows:

I have taken a few of my father's works, such as "The Red Mill", "Naughty Marietta", "M'lle Modiste" and "Babes in Toyland", and here is what I find:

On "The Red Mill", there are 46 copyrights and 11 arrangements. I have also taken out 28 renewals of copyright on the various numbers of "The Red Mill". Annexed hereto and made part hereof, is a list of the copyrights of the various numbers, arrangements and renewals, marked Schedule "I".

[fol. 235] On "Naughty Marietta", there are 58 copyrights, and annexed hereto, made part hereof and marked Schedule "II", is a list of the respective copyrights covering that work.

On "M'lle Modiste", the publisher, M. Witmark & Sons, has enumerated 53 original copyrights and 25 renewals, making a total of 78 copyrights, as appears by a list annexed hereto and made part hereof, marked Schedule "III".

On "The Red Mill", my records number 44 original copyrights and 28 renewals, or a total of 72 copyrights, as appears by a schedule hereto annexed, marked Schedule "IV".

On "Babes in Toyland", my records indicate 32 original copyrights and 31 renewals, or a total of 63 copyrights; all as appears by a list annexed hereto and marked Schedule "V".

However, my records and the records of the publishers, on the works above mentioned, do not seem to tally, and we have never been able to come to entire agreement with respect to all of the copyrighted works composed by my father. In some cases, the publishers seem to have copyrights for works of which I have no record, and in other cases, I have copyrights of works of which they seem to have no record.

In "M'lle Modiste", there was a lengthy song entitled, "If I Were On the Stage". Mme. Fritzi Scheff appeared

in the original version of the production. At the very end of that song, there was a finale number which proved to be tremendously popular. The audiences liked it so much that the publishers decided to bring it out as a separate number; this was done; and this finale part of the song of "M'lle Modiste" was published as the song, "Kiss Me Again". To this day, it continues to be very popular. My publisher's list indicates ten separate copyrights on "Kiss [fol. 236] Me Again", in addition to the number "If I Were on the Stage"; as appears by Schedule "III" hereto annexed, most of these are arrangements. With respect to each of these, various licenses have been granted, uses made, and rights conveyed, not only in the United States, but in Great Britain, Germany, France, Italy, Spain and other countries throughout the world.

The operetta, "M'lle Modiste", (like most of my father's operettas) has been published as an entire operetta in the form of a complete score.

For a great many years manufacturers have made and are still making records and music rolls of substantially all of my father's musical compositions; no payment therefor has ever been made to my father or me except the two cents for each record or roll required by Section 1 E of the Copyright Act. Neither my father nor I have ever given to such manufacturers a license authorizing them to give purchasers of such records or rolls the right to use the same for public performances for profit; the Copyright Act expressly denies such right to the manufacturers and the purchasers of the records and rolls. The State Statute however, in direct conflict with the Copyright Act, confers that right upon manufacturers and purchasers. I have no means of preventing such manufacturers from making records and rolls in the future, and from sending them to and selling them in the States of Nebraska or Florida.

Under the Florida Law, anyone buying a score of that operetta, would have a right to perform the entire operetta publicly in an auditorium before thousands of people, for an indefinite period of time, without paying any additional compensation to me whatsoever.

[fol. 237] A motion picture company, operating in the State of Florida, could incorporate the entire operetta in a motion picture, without granting any additional compensation to me.

It cannot be that the will of Congress which has protected me in these exclusive rights may be set aside by the State of Florida.

As shown by the annexed schedules, there have been a great many renewals of copyright taken out either by me or by my brother and me. (My brother, Clifford V. Herbert, and I were the only children and my mother is dead.) These renewals are of great value to me.

If I were required to ascertain whether performances in Florida were from sheets of music purchased in that State or to attempt to fix a price for all uses it would involve engaging a corps of employees, a large corps of investigators and accountants, lawyers and experts who would be qualified to determine the value of a particular use of a particular composition in a particular establishment.

Considering that there are 30,000 establishments throughout the country, anyone of which might perform all or part of my father's works every night of the week, it would be a terrific burden for me to keep track of the performances. It is only by reason of my membership in the American Society of Composers, Authors and Publishers that I am able to obtain compensation for the public performance for profit of my father's works.

The renewals of copyright taken out by me are, in my opinion, worth in excess of \$100,000.00. My right to renew the copyrights of my father's works, as the original copy-[fol. 238] rights expire, from time to time, is worth in excess of \$100,000.00. If the State Statute were to be enforced, the value of the aforementioned renewal rights to me would be totally destroyed.

As the initial terms of the respective copyrights in the works of my late father expire, the renewal rights vest in me, in some cases alone, and in some cases jointly with my brother Clifford Herbert. I have exercised such rights with respect to certain compositions and am continuing and will continue to exercise such rights with respect to other compositions, from time to time, as such rights accrue to me.

Under the Copyright Law, I have the right, when each renewal term vests in me, to transfer to a publisher only the publishing rights and to reserve to myself, or to the Society, or to others, the public performing rights or any other rights in such works, for limited periods or for the balance of the term of copyright nor am I compelled to grant to

manufacturers of records and rolls any right except the limited right to manufacture.

Under the State Statute, I must grant to my publisher and to the manufacturers of records and rolls not only the right of publication and manufacture respectively but all other rights under the copyright, since they are given the sole power to fix the value and price of public performances for profit and other uses of my copyrighted works in the State of Florida.

This is an arbitrary and unjustifiable interference with my right to make contracts and with the rights granted to me under the Copyright Law of the United States, and will [fol. 239] seriously impair the value of my existing rights in copyrights, as well as my right to renew copyrights with respect to which the original term has not yet expired.

Ella Herbert Bartlett.

Sworn to before me this 21st day of January, 1938.
Marion L. Elkin, Notary Public, New York County.
N. Y. Co. Clk. No. 103, Reg. No. 9 E 95. Bronx Co.
Clk. No. 11, Reg. No. 48 E 39. Kings Co. Clk. No.
22, Reg. No. 9090. Commission expires March 30,
1939.

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Schedule I

240

ACKNOWLEDGEMENTS FROM THE COPYRIGHT OFFICE OF THE RECEIPT OF
TWO COPIES OF THE FOLLOWING COMPOSITIONS FROM "THE RED MILL"

- 1 DRAMATIC COMPOSITION
 (BECAUSE YOU'RE YOU
 (" " " Arr. for Trombone Solo
 (" " " " " Cornet Solo
7 (6) (" " " " " Mandolin Orch.
 (" " " " " Guitar Solo
 (" " " " " Hotel Orch.
8 ENTRANCE (GOVERNOR AND CHORUS)
9 EVERY DAY IS LADIES DAY WITH ME
10 GOOD-A-BYE JOHN
11 GO WHILE THE GOIN' IS GOOD
12 THE RED MILL FANTASIA
13 FINALE 11
15 (2) (IF YOU LOVE BUT ME
 (" " " " " Arr. for Orchestra
16 I'LL RING THE BELL
17 I'M ALWAYS DOING SOMETHING I DON'T WANT TO DO
 (IN THE ISLE OF OUR DREAMS
21 (4) (" " " " " Arr. for Hotel Orch.
 (" " " " " " " Cornet Solo
 (" " " " " " " Trombone Solo
23 (2) (THE LEGEND OF THE MILL
 (" " " " " Arr. for Hotel Orch.
25 (2) (MIGNONETTE
 (" Arr. for Hotel Orch.
26 MOONBEAMS
27 OPENING CHORUS ACT 1
29 (2) (THE STREETS OF NEW YORK
 (" " " " " Arr. for Hotel Orch.
30 WHEN YOU'RE PRETTY THE WORLD IS FAIR
32 (2) (WHISTLE IT
 (" " Arr. for Hotel Orch.
33 A WIDOW HAS WAYS
34 YOU NEVER CAN TELL ABOUT A WOMAN
35 THE RED MILL VOCAL SCORE
37 (2) (LANCERS
 ("
39 (2) (MARCH AND TWO STEP Arr. for Band
 (" " " " " " " Orchestra
40 SCHOTTISCHE Arr. for Orchestra
43 (3) (SELECTION
 (" Arr. for Orchestra
 (" " " Band
46 (3) (WALTZES
 (" Arr. for Mandolin Orch.
 (" " " Orchestra

CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING
ARRANGEMENTS OF "MOONBEAMS" From "THE RED MILL"

241

- 11 Arrangements MIXED VOICES
VOCAL ORCHESTRA
MALE VOICES
DUET IN D
FEMALE VOICES
TWO PART SONG
THREE PART SONG
S.A.B.
CELLO AND PIANO
VIOLIN CELLO AND PIANO
VIOLIN AND PIANO

RENEWAL CERTIFICATES COVERING THE FOLLOWING COMPOSITIONS
FROM "THE RED MILL"

- 1 DRAMATIC COMPOSITION
2 BECAUSE YOU'RE YOU
3 ACT 1 OPENING CHORUS
4 " 2 " "
5 ENSEMBLE
6 ENTRANCE SONG AND CHORUS
7 EVERYDAY IS LADIES DAY WITH ME
8 GOOD A BYE JOHN
9 GO WHILE THE GOING IS GOOD
10 FINALE 1
11 " 2
12 IF YOU LOVE BUT ME
13 I'LL RING THE BELL
14 Renewals IN THE ISLE OF OUR DREAMS
15 I'M ALWAYS DOING SOMETHING I DON'T WANT TO DO
16 LANCERS
17 THE LEGEND OF THE MILL
18 MIGNONETTE
19 MOONBEAMS
20 OVERTURE
21 SELECTION
22 THE STREETS OF NEW YORK
23 TEACH THEM WHAT TO SAY
24 WHISTLE IT
25 VOCAL SCORE
26 WHEN YOU'RE PRETTY AND THE WORLD IS FAIR
27 A WIDOW HAS WAYS
28 YOU NEVER CAN TELL ABOUT A WOMAN

- 11 Arrangements on Moonbeams
28 Renewals
46 Copyrights (originals)
85 Separate copyrights and renewals

CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING NUMBERS
FROM "NAUGHTY MARIETTA"

1		DRAMATIC COMPOSITION	
		(AH SWEET MYSTERY OF LIFE	
		" " " " " " Arr. for Violin, Cello & Piano	
		" " " " " " " " Dance Orch.	
		" " " " " " " " Piano	
		" " " " " " " " Violin & Piano	
		" " " " " " " " Duet In D	
		" " " " " " " " " " B Flat	
17	(16)	" " " " " " " " Three Part Song	
		" " " " " " " " Mixed Voices	
		" " " " " " " " Male Voices	
		" " " " " " " " Two Part Song	
		" " " " " " " " Male Voices	
		" " " " " " " " Vocal Orch.	
		" " " " " " " " Female Voices	
		" " " " " " " " S.A.B.	
		" " " " " " " " Cello & Piano	
18		ALL I CRAVE IS MORE OF LIFE	
19		BARN DANCE SCHOTTISCHE	
20		DANCE OF THE MARIONETTES	
		(THE DREAM MELODY	
23	(3)	(THE DREAM MELODY Arr. for Orchestra	
		(THE DREAM MELODY " " Band	
24		IF I WERE ANYBODY ELSE BUT ME	
		(I'M FALLING IN LOVE WITH SOMEONE	
28	(4)	" " " " " " " " Arr. for Mixed Voices	
		" " " " " " " " " " Hotel Orch.	
		" " " " " " " " " " Mandolin Orch.	
		(ITALIAN STREET SONG	
		" " " " " " " " Arr. for Hotel Orch.	
		" " " " " " " " " " Duet in F	
		" " " " " " " " " " Soprano Solo	
37	(9)	" " " " " " " " " " Mixed Chorus	
		" " " " " " " " " " Three Pt. Song	
		" " " " " " " " " " S.A.B.	
		" " " " " " " " " " Two Pt. Song	
		" " " " " " " " " " Voc. Orch.	
38		IT NEVER NEVER CAN BE LOVE	
40	(2)	(IT'S PRETTY SOFT FOR SIMON	
		" " " " " " " " " " Hotel Orch.	
41		LANCERS	
42		LIVE FOR TODAY	
43		MISTER VOODOO	
45	(2)	(NAUGHTY MARIETTA	
		" " " " " " " " " " Hotel Orch.	
46		NEATH THE SOUTHERN MOON	
47		NEW ORLEANS JEUNESSE	
		(SELECTION	
51	(4)	" " " " " " " " " " Mandolin Orch.	
		" " " " " " " " " " Band	
		" " " " " " " " " " Orchestra	
52		THE SWEET BY AND BY	
54	(2)	(TRAMP TRAMP TRAMP	
		" " " " " " " " " " T.T.B.E.	

CERTIFICATES OF PUBLICATION COVERING THE FOLLOWING NUMBERS
FROM "NAUGHTY MARIETTA"

243

56 (2) (WALTZES
(" Arr. for Orchestra
57 WE'VE HUNTED THE WOLF IN THE FOREST
58 YOU MARRY A MARIONETTE

58 Copyrights

M'LE. MODISTE

Music - Victor Herbert

Book - Henry Blossom, Jr.

Partial List of Original Copyrights - in name of:
 (M. Witmark & Sons, New York, as trustees for Victor Herbert
 and
 (Henry Blossom, Jr.

- 1 Book — Copyrighted October 6, 1905 - Entry D 7367
 2 Vocal Score — Copyrighted October 30, 1905 - Entry C 105903

Individual Numbers

"If I Were on the Stage" (Note: original title of "Kiss Me Again")

- 3 Song:- Copyrighted October 13, 1905 - Entry C 104750
 4 Arrangement for Hotel Orchestra - Copyrighted November 3, 1905,
 Entry C 106471
 5 Arrangement for Mandolin Orchestra by T. P. & Geo. J. Trinkaus
 Copyrighted December 21, 1906 - Entry C 137558

6 "In Dreams So Fair"

Song:- Copyrighted January 25, 1906 - Entry C 112826

"Kiss Me Again" (part of "If I were on the Stage")

- 7 Copyrighted: April 16, 1915 - Entry E 358936 - song
 8 June 7, 1915 - Entry E 364261 - Vocal Orch. Arrg.
 9 April 20, 1916 - Entry E 388379
 10 Oct. 18, 1916 - Entry E 398837
 11 April 12, 1918 - Entry E 424236 - Band Arrangement
 12 May 10, 1918 - Entry E 427376 - Arrg. by Otto Langey
 13 August 20, 1921 - Entry E 533584
 14 August 11, 1928 - Entry E 699618 -
 15 Dec. 7, 1931 - Entry E 523779 - Arrg. for violin
 16 E 523781 - and piano

"I Want What I Want When I Want It"

- 17 Copyrighted:- October 4, 1905 - Entry C 104028
 18 January 20, 1906 - Entry C 112488
 19 May 5, 1906 - Entry C 120630

"Chorus of Footmen"

- 20 Song Copyrighted October 13, 1905 - Entry C 104751
 21 Piano Arrangement Copyrighted October 13, 1905 - Entry C 104752

"Dear Little Girl Who is Good"

- 22 Copyrighted September 29, 1905 - Entry C 103563

23 Copyright September 29, 1905 - Entry C 103564

"I'm Always Misunderstood"

24 Copyright October 7, 1905 - Entry C 104282

"I Should Think You Could Guess"

25 Copyright October 7, 1905 - Entry C 104283

"Mascot of the Troop"

26 Song - Copyright October 7, 1905 - Entry C 104281
27 March - Copyright July 2, 1906 - Entry C 134697
28 Two Step for Piano - Arrg. by Karl L. Hoschner
Copyright January 20, 1906 - Entry C 112489
29 Arrg. for Hotel Orchestra
Copyright October 27, 1905 - Entry C 105784
30 March & Two Step Arrg. for Orchestra
Copyright February 21, 1906 - Entry C 114739

"Keokuk Culture Club"

31 Song - Copyright, October 16, 1905 - Entry C 105025

"The Time, The Place, and The Girl"

32 Song - Copyright October 12, 1905 - Entry C 104690
33 Arrg. for Hotel Orch.
Copyright November 3, 1905 - Entry C 106470
34 Arrg. by Trinkaus for Mandolin Orch.
Copyright February 9, 1906 - Entry C 113860

"The Nightingale and The Star"

35 Copyright October 14, 1905 - Entry C 104803

"When The Cat's Away the Mice Will Play"

36 Song - Copyright October 16, 1905 - Entry C 105026
37 Arrg. by George Trinkaus for Mandolin Orch.
Copyright December 20, 1924 - Entry C 606021

"Ze English Language"

38 Song - Copyright October 12, 1905 - Entry C 104691

"Love Me, Love My Dog"

39 Song - Copyright September 25, 1905 - Entry C 103305

Opening Chorus - Act I

40 Copyright October 23, 1905 - Entry C 105504

Finale Act I

246

41 Copyright November 3, 1905 - Entry C 106468

Opening Chorus - Act II

42 Copyright October 20, 1905 - Entry C 105311

Entr Acte

43 Piano - Copyright December 29, 1905 - Entry C 105023

44 Arrg. for Orch. by H. L. Rogers - Copyright January 29, 1906
Entry C 113103

Ballet

45 Piano - Copyright October 16, 1905 - Entry C 105023

Selections

46 Piano Arrg. Copyright October 30, 1905 - Entry C 105902

47 Orch. arrg. by Otto Langey Copyright January 15, 1906
Entry C 112206

Miscellaneous

48 Fantasia Arrangement by Tom Clark for piano and trombone
Copyright August 24, 1907 - Entry C 160407

49 ditto for piano and coronet
Copyright August 24, 1907 - Entry C 160408

50 Waltz Arrangement for Orchestra by Otto Langey
Copyright March 3, 1906 - Entry C 115495

51 ditto for piano by Karl J. Hoschner
Copyright February 21, 1906, Entry C 114732

52 March and Two Step
Arrangement for Orchestra by Otto Langey
Copyright February 21, 1906 - Entry C 114738

53 Lancers Arrangement for Orchestra by Otto Langey
Copyright January 29, 1906 - Entry C 113104

- 1 Book - Renewed in name of Marjorie Wilson, widow of author;
November 5, 1932 - Entry R 22194 (7367)

Following Renewed in name of Ella Herbert Bartlett, Clifford Herbert,
and Marjorie Wilson:

Vocal Score

- 2 December 2, 1932 - Entry R 22367 (105903)

"If I Were on The Stage" ("Kiss Me Again")

- 3 Song December 2, 1932 - Entry R 22366 (104750)
4 Hotel Orch. Arrg. December 10, 1932 Entry R 22495 (106471)

"I Want What I Want When I Want It"

- 5 November 5, 1932 - Entry R 22026 (104028)

"Chorus of Footmen"

- 6 Song December 2, 1932 - Entry R 22368 (104751)
7 Piano Arrg. December 2, 1932 - Entry R 22369 (104752)

"Dear Little Girl Who is Good"

- 8 November 5, 1932 - Entry 22024 (103563)

"Hats Make the Woman"

- 9 November 5, 1932, - Entry R 22025 (103564)

"I'm Always Misunderstood"

- 10 November 5, 1932 - Entry R 22022 (104282)

"I Should Think that you Could Guess"

- 11 November 5, 1932 - Entry R 22023 (104283)

"Mascot of the Troop"

- 12 Song - November 5, 1932 - Entry R 22021 (104281)

"Keokuk Culture Club"

- 13 Song - December 2, 1932 - Entry R 22387 (105025)

"The Time, The Place and The Girl"

- 14 Song - December 2, 1932 - Entry R - 22363 (104690)
15 Hotel Orch. Arr. December 10, 1932 - Entry R 22494 (106470)

"The Nightingale and The Star"

16 December 2, 1932 - Entry R 22375 (104803)

"When The Cat's Away"

17 December 2, 1932 - Entry R 22388 (105026)

"Ze English Language"

18 December 2, 1932 - Entry R 22364 (104691)

"Love Me Love My Dog"

19 October 5, 1932 - Entry R 21656 (103305)

Opening Chorus - Act I

20 December 2, 1932 - Entry R 22402 (105504)

Finale - Act I.

21 December 9, 1932, - Entry R 22493 (106468)

Opening Chorus - Act II.

22 December 2, 1932 - Entry R 22395 (105311)

Entr Act

23 Piano - January 3, 1933 - Entry R 33851 (111033)

Ballet

24 Piano - December 2, 1932 - Entry R 22386 (105023)

Selections

25 Piano - December 2, 1932 - Entry R 22413 (105902)

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Henry Blossom, Jr.
Renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson.

		— ORIGINAL —		— RENEWALS —	
		Date	Entry No.	Date	Entry No.
1	Book	Aug. 27, 1906	D-8998	Jan. 29, 1934	R-29233 1
2	Vocal Score	Sept. 27, 1906	C-130652	Jan. 6, 1934	R-28441 2
Individual Numbers					
3	Overture—Piano Score	Sept. 24, 1906	C-130367	Jan. 6, 1934	R-28420 3
4	Opening Chorus—Act I	July 25, 1906	C-126164	Aug. 25, 1933	R-26740 4
5	Entrance Song and Chorus	Aug. 22, 1906	C-127973	Aug. 25, 1933	R-26766 5
6	Finale I	Aug. 6, 1906	C-126953	Aug. 25, 1933	R-26749 6
7	Opening Chorus—Act II	Aug. 6, 1906	C-126954	Aug. 25, 1933	R-26750 7
8	Ensemble	Aug. 10, 1906	C-127259	Aug. 25, 1933	R-26756 8
9	Finale II	Sept. 24, 1906	C-130368	Jan. 6, 1934	R-28425 9
10	Because You're You	Sept. 7, 1906	C-129045	Sept. 21, 1933	R-27086 10
11	Every Day Is Ladies Day	Sept. 7, 1906	C-129046	Sept. 21, 1933	R-27087 11
12	Good-a-bye, John	Sept. 24, 1906	C-130414	Jan. 6, 1934	R-28433 12
13	Go While the Going is Good	Aug. 22, 1906	C-127974	Aug. 25, 1933	R-26767 13
14	If You Love But Me	Mar. 30, 1907	C-147028	Apr. 3, 1934	R-30899 14
15	I'll Ring the Bell	Sept. 24, 1906	C-130415	Jan. 6, 1934	R-28434 15
16	I'm Always Doing Something	Aug. 22, 1906	C-127975	Aug. 25, 1933	R-26768 16
17	In the Isle of Our Dreams	Aug. 22, 1906	C-127977	Aug. 25, 1933	R-26770 17
18	Legend of the Mill	Aug. 6, 1906	C-126956	Aug. 25, 1933	R-26752 18
19	Mignonette	July 19, 1906	C-125813	Aug. 25, 1933	R-26734 19
20	Moonbeams	Oct. 6, 1906	C-131451	Jan. 6, 1934	R-28455 20
21	Streets of New York	Aug. 22, 1906	C-127976	Aug. 25, 1933	R-26769 21
22	Teach Them What To Say	Aug. 10, 1906	C-127258	Aug. 25, 1933	R-26755 22
23	When You're Pretty and the World is Fair	Jan. 24, 1907	C-140923	Jan. 29, 1934	R-29202 23
24	Whistle It	Aug. 6, 1906	C-126955	Aug. 25, 1933	R-26751 24
25	A Widow Has Ways	July 19, 1906	C-125812	Aug. 25, 1933	R-26733 25
26	You Never Can Tell About A Woman	July 19, 1906	C-125811	Aug. 25, 1933	R-26732 26
27	Because You're You—Arrg't for Guitar by T. P. & Geo. J. Trinkaus	Mar. 5, 1907	C-144656		
28	In The Isle of Our Dreams—Arrg't for Mandolin Orch. by Trinkaus	Feb. 2, 1907	C-142116		
29	Selections—Arrg'd for Military Band by Herbert L. Clarke	Mar. 4, 1907	C-144584		
30	March and Two Step—Arrg'd for Band by Herbert L. Clarke	Mar. 4, 1907	C-144585		
31	March and Two Step—Arranged for Orchestra by Otto Langey	Dec. 3, 1906	C-139003		
32	Waltzes—Arrg'd for Mandolin Orch. by Trinkaus	May 1, 1907	C-150181		
33	Schottische—Arrg'd for Orchestra by Otto Langey	Dec. 31, 1906	C-139002		

RED MILL

		— ORIGINAL —		— RENEWALS —	
		Date	Entry No.	Date	Entry No.
34	Lancers—Arrg'd by Otto Langey Orchestra Parts only	Oct. 29, 1906	C-133348		
35	Because You're You—Arrg'd for Mandolin Orch. by Trinkaus	Dec. 13, 1906	C-136836		
36	Selections—Arrg'd for Orchestra by Otto Langey	Nov. 17, 1906	C-134786		
37	Waltzes—Arrg'd for Orchestra by Otto Langey	Dec. 7, 1906	C-136302		
38	If You Love But Me—Arrg'd for Orchestra by W. C. O'Hare	June 4, 1907	C-153642		
39	Fantasia—Arrg. for Piano and Trombone by Tom Clark	Aug. 24, 1907	C-16404		
40	Fantasia—Arrg. for Piano and Cornet by Tom Clark	Aug. 24, 1907	C-16405		
41	In the Isle of Our Dreams—Song with Guitar Accom. arr. by Trinkaus	Mar. 8, 1907	C-146181		
42	Selections—Arrg. for Mandolin Orch. by Trinkaus		C-146606		
43	Waltzes—Arrg. for Military Band by Herbert L. Clarke	Apr. 3, 1907	C-147325		
44	Lancers—Arrg. for Piano by Karl L. Hoschna	Jan. 23, 1908	C-172634	Apr. 11, 1935	R-37148 27
	Selections—Arrg. by Karl L. Hoschna			1934	R-28472 28

44 Original Copyrights
28 Renewals
72 Copyrights Total

BABES IN TOYLAND

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Glen MacDonough.
Renewals issued to Ella H. Bartlett, Clifford Herbert and Alan MacDonough.

		— ORIGINAL —		— RENEWALS —	
		Date	Entry No.	Date	Entry No.
1	Book	June 15, 1903	D-3587	June 26, 1930	9435 1
2	Vocal Score	Aug. 22, 1903	C-53514	Aug. 22, 1903	R-9900 2
Individual Numbers					
3	March of the Toys—Piano Score	June 25, 1903	C-50193	July 25, 1930	R-9794 3
4	Babes in Toyland Waltzes Arrg't for Piano by Karl Hoschna	Aug. 11, 1903	C-52908	Sept. 3, 1930	R-9990 4
5	Selections—Piano Arrg't by K. Hoschna	Aug. 13, 1903	C-53048	Sept. 3, 1930	R-9991 5
6	March and Two Step Arr. for Piano by Hilding Anderson	Aug. 27, 1903	C-53819	Sept. 3, 1930	R-10028 6
7	Toyland	May 14, 1903	C-47877	July 25, 1930	R-9793 7
8	Opening Act 3—Chorus	Sept. 23, 1903	C-55185	Sept. 24, 1930	R-10300 8
9	Opening Act 2— "	Aug. 13, 1903	C-53068	Sept. 3, 1930	R-9992 9
10	Barney O'Flynn	July 1, 1903	C-50620	July 25, 1930	R-9790 10
11	Beatrice Barefacts	May 28, 1904	C-71675	June 3, 1931	R-14757 11
12	Before and After	May 11, 1903	C-47607	July 25, 1930	R-9792 12
13	Birth of the Butterfly—Finale Act I	Aug. 19, 1903	C-53345	Sept. 3, 1930	R-10023 13
14	Country Dance	Aug. 13, 1903	C-53067	Sept. 3, 1930	R-10021 14
15	Contrary Mary	May 11, 1903	C-47608	Sept. 3, 1930	R-9989 15
16	Floretta	June 5, 1903	C-49100	July 25, 1930	R-9796 16
17	Go to Sleep, Slumber Deep	July 22, 1903	C-51815	July 22, 1930	R-9798 17
18	Gavotte (Eccentric Dance) Piano	Aug. 19, 1903	C-53344	Sept. 3, 1930	R-10024 18
19	He Won't Be Happy Till He Gets It (Words by Chas. N. Douglas)	Jan. 11, 1904	C-62674	Jan. 14, 1931	R-12327 19
20	I Can't Do That Sum	Oct. 31, 1903	C-57876	Nov. 1, 1930	R-11039 20
21	In the Toymakers Workshop	Oct. 7, 1903	C-56203	Nov. 19, 1930	R-11431 21
22	Jane	June 17, 1903	C-49789	July 25, 1930	R-9795 22
23	John Johnson	May 14, 1903	C-47876	Sept. 3, 1930	R-9988 23
24	Legend	Aug. 22, 1903	C-53511	Sept. 3, 1930	R-10027 24
25	Mignonette	Aug. 19, 1903	C-53342	Sept. 3, 1930	R-10022 25
26	Military Ball	July 1, 1903	C-50619	July 25, 1930	R-9791 26
27	The Moon Will Help You Out	July 8, 1903	C-51047	July 25, 1930	R-9799 27
28	Never Mind Bo Peep	Aug. 19, 1903	C-53343	Sept. 3, 1930	R-10025 28
29	Our Castle in Spain	Dec. 7, 1903	C-60317	Dec. 10, 1930	R-11786 29
30	Song of the Poet	Aug. 22, 1903	C-53509	Sept. 3, 1930	R-10026 30
31	With Downcast Eye Renewals	May 28, 1903	C-48664	July 25, 1930	R-9797 31
32	I Can't Do That Sum—Polka Two Step Arr. by Karl. Hoschna	June 11, 1904	C-72377		

32 Original Copyrights

31 Renewals

63 Copyrights Total

[fol. 252]

SCHEDULE VI

Agreement, made and entered into this 8th day of June, 1910, by and between Victor Herbert, of the City of New York, party of the first part, and M. Witmark & Sons, a corporation organized under the laws of the State of New York, party of the second part,

Whereas, the party of the first part has undertaken to write the musical score of a musical play entitled

“Trentini”

(Title Subject to Change)

the book and lyrics of which are by Rida Johnson Young, to be produced under the management of
and

Whereas, the party of the second part is desirous of acquiring the exclusive license to print, publish and sell said musical score and any part or parts thereof, and the libretto and lyrics thereof, and any arrangement or selection of the whole or any part thereof.

Now, Therefore, this Agreement Witnesseth:

I. This agreement is made in consideration of the sum of One Dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged and in consideration of the faithful performance by the party of the second part of the terms, covenants and conditions hereinafter contained; and this agreement is limited exclusively to matters in connection with the printing, publishing and selling copies of said score, libretto and lyrics and parts thereof.

II. The party of the first part hereby grants to the party of the second part the sole and exclusive license and privilege to print, publish and sell in all countries copies of the libretto and lyrics and piano and vocal score of said musical play, or any part or portion of the said libretto, lyrics [fol. 253] and score and copies of any arrangement or selection of the whole or any part of said libretto, lyrics and score during the term of the copyrights thereof and renewals of such copyrights.

III. The party of the second part in consideration of said license, agrees at its own cost and expense, to do all acts and take all proceedings necessary or convenient to the procurement of copyright or copyrights with renewals of the same

in said libretto, lyrics and score and each and every part thereof and in all selections and arrangements thereof, as well as to give copyright performances in England and wherever necessary to protect the performing rights therein, in all countries in which it is possible to secure copyright and said copyrights so secured shall remain and be for all time the sole and absolute property of the party of the first part and to be held by the party of the second part in trust for the party of the first part; and the party of the second part further agrees at its cost and expense, to take all necessary and proper steps for the purpose of protecting the said copyrights from infringement and otherwise. All copyright performances given as aforesaid shall be at the cost and expense of the party of the first part.

IV. That all arrangements and selections of said score and any part thereof shall be made under the supervision and direction of the party of the first part, at the cost and expense of the party of the second part and the party of the second part shall employ only such musician or musicians for this purpose as may be named by the party of the first part and that neither the said score nor any part thereof, nor any arrangement or selection of the whole or any part of said score shall be published by the party of the second part unless under the supervision of the party of the first [fol. 254] part. The party of the second part further agrees to print and publish in first class style, the said libretto, lyrics and piano and vocal score and separately such numbers, songs and pieces thereof and such arrangements and selections thereof as may be directed by the party of the first part. The party of the second part agrees to insert upon each copy published the copyright notice or notices required by law, including the notice "that all performing rights are reserved." The party of the second part further agrees that no advertising matter of any kind shall appear on or in connection with the said publication, except such as relates to the said libretto, lyrics or score or the parts thereof, or other compositions composed by the party of the first part.

V. The party of the second part hereby agrees to pay to the party of the first part the following royalties: Twelve (12c) cents for and upon each and every copy of the piano and vocal score of said musical and dramatic composition sold by the party of the second part; an amount equal to ten (10%) per cent of the retail-marked price thereof for and

upon each and every copy of any separate number or songs or any combination of two or more numbers or songs of said musical play when printed together with the words thereof: an amount equal to fifteen (15%) per cent of the retail marked price thereof upon each and every copy of any arrangement or selection of the whole or any part of the music of said musical play for piano or any solo instrument, and an amount equal to ten (10%) per cent of the retail marked price upon each and every copy sold of arrangements for band and orchestra. The party of the second part agrees that the retail marked price of the various publications hereinbefore set forth shall be those customary and prevalent among first class music houses.

[fol. 255] It is understood that no royalties are to be paid for single numbers designated as "new issues" but the total number of such "new issues" are not to exceed one thousand.

VI. That party of the second part agrees not to distribute, sell, offer or expose for sale any copy of the said libretto and lyrics, piano and vocal scores, or any part or portion of the said libretto, lyrics and scores or any arrangement or selection of the whole or any part thereof, without the signature of the party of the first part conspicuously stamped or impressed upon the title page thereof, either by the party of the first part personally or by his duly authorized agent, and the party of the second part agrees immediately after printing any such copy to submit the same to the party of the first part or his duly authorized agent for signature. The party of the first part agrees at all reasonable times, personally or through his duly authorized agent, to impress or stamp his signature on any such copy as frequently as the party of the second part may reasonably require.

VII. The party of the second part further agrees that it will make regular settlements under this contract promptly on or about the fifteenth day of June and December in each year during the existence of said copyrights and that at the time of such settlement and payment, it will deliver to the party of the first part a full, true and itemized statement showing in detail all sales made by the party of the second part of any publication hereinbefore set forth and the royalties due said party of the first part at the time of such settlement.

VIII. The said party of the second part agrees that it will keep or cause to be kept, books of account in which full and [fol. 256] complete entry shall be made of all said publications printed and sold by the party of the second part and its agents and the said books shall at all reasonable times be open to the inspection of the party of the first part or his agent duly appointed in writing; and the said party of the first part or his attorney, shall have the right to examine any and all books of account of the said party of the second part containing any items, memoranda or information relating to the printing and sale of said publications, and to inspect and count the number of copies on hand.

IX. This contract shall not under any circumstances be considered as licensing the party of the second part to present or perform the said libretto, lyrics and musical score or any part thereof or granting any rights therein, except the publication rights. It is understood that this license is personal to the party of the second part and is not assignable by it without the consent in writing of the party of the first part.

X. The term "score" as used herein shall include any additional musical numbers that may be written for said play at any time.

XI. It is expressly understood that no numbers written by any person other than the party of the first part shall be published as part of the said libretto, lyrics and musical score nor shall any such number be published with a title page like or similar to that of the musical score.

XII. It is mutually agreed that the rights hereby granted to the party of the second part by the party of the first part are dependent upon the faithful performances by it of all the covenants and conditions herein contained and the failure of the party of the second part to carry out or perform [fol. 257] any of the covenants and conditions contained in this contract shall render its rights hereunder voidable at the option of the party of the first part and upon the party of the first part giving notice to the party of the second part terminating this agreement, then all rights which the party of the second part may obtain by virtue of this contract shall cease and terminate, and shall at once revert to the party of the first part and shall belong to him as if this contract had never been made, without prejudice to any

rights that the party of the first part may have by reason of any breaches of this contract; and in such event, or in the event of the bankruptcy or insolvency of the party of the second part or its abandonment of the music publishing business, the party of the second part agrees to immediately assign to the party of the first part in proper form, any and all copyrights which the party of the second part may have secured by virtue of this contract and at the same time to return all manuscripts belonging to the said party of the first part.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of:

Victor Herbert (Seal) (L. S.), M. Witmark & Sons,
by Isidore W. Witmark, Pres. (L. S.)

[fol. 258]

Schedule VII

Agreement, made and entered into this 2nd day of April, 1914, by and between Victor Herbert, of the City of New York, party of the first part, and M. Witmark & Sons, a corporation organized under the laws of the State of New York, party of the second part,

Whereas, the party of the first part has undertaken to write the musical score of a musical play entitled "*The Only Girl*" (Title subject to change)—the musical version of "*Our Wives*"), and

Whereas, the party of the second part is desirous of acquiring the exclusive license to print, publish and sell said musical score and any part or parts thereof, and the libretto and lyrics thereof, and any arrangement or selection of the whole or any part thereof,

Now, Therefore, this Agreement, Witnesseth:

First. This agreement is made in consideration of the sum of One Dollar by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged and in consideration of the faithful performance by the party of the second part of the terms, covenants and conditions hereinafter contained; and this agreement is limited exclusively to matters in connection with the printing, publishing and

selling copies of said score, libretto and lyrics and parts thereof.

Second. The party of the first part hereby grants to the party of the second part the sole and exclusive license and privilege to print, publish and sell in all countries copies of the libretto and lyrics and piano and vocal score of said musical play, or any part or portion of the said libretto; lyrics and score and copies of any arrangement or selection of the whole or any part of said libretto, lyrics and score during the term of the copyrights thereof and renewals of such copyrights.

[fol. 259] Third. The party of the second part in consideration of said license, agrees at its own cost and expense, to do all acts and take all proceedings necessary or convenient to the procurement of copyright or copyrights with renewals of the same in said libretto, lyrics, and score and each and every part thereof and in all selections and arrangements thereof.

Fourth. That all arrangements and selections of said score and any part thereof shall be made under the supervision and direction of the party of the first part, at the cost and expense of the party of the second part and the party of the second part shall employ only such musician or musicians for this purpose as may be named by the party of the first part and that neither the said score nor any part thereof, nor any arrangement or selection of the whole or any part of said score shall be published by the party of the second part unless under the supervision of the party of the first part. The party of the second part further agrees to print and publish in first class style, the libretto, lyrics and piano and vocal score and separately such numbers, songs and pieces thereof and such arrangements and selections thereof as may be directed by the party of the first part. The party of the second part agrees to insert upon each copy published the copyright notice or notices required by law, including the notice "that all performing rights are reserved". The party of the second part further agrees that no advertising matter of any kind shall appear on or in connection with the said publication, except such as relates to the said libretto, lyrics or score or the parts thereof, or other compositions composed by the party of the first part.

Fifth. The party of the second part hereby agrees to pay to the party of the first part the following royalties: Twelve and one-half ($12\frac{1}{2}\text{¢}$) cents for and upon each and every copy of the piano and vocal score of said musical and dramatic composition sold by the party of the second part; an amount equal to seven and one-half ($7\frac{1}{2}\%$) per cent of the retail market price thereof for and upon each and every copy of any separate number or song or any combination of two or more numbers or songs of said musical play when printed together with the words thereof; an amount equal to seven and one-half ($7\frac{1}{2}\%$) per cent of the retail marked price thereof upon each and every copy of any arrangement or selection of the whole or any part of the music of said musical play for piano or any solo instrument. The party of the second part agrees that the retail marked price of the various publications hereinbefore set forth shall be those customary and prevalent among first class music houses.

It is understood that no royalties are to be paid for single numbers designated as "new issues" but the total number of such "new issues" are not to exceed one thousand.

The party of the first part hereby assigns, transfers, sets over and conveys to the party of the second part all mechanical rights in the lyrics written and composed by him for the musical play above mentioned, and the said party of the second part hereby agrees to collect such royalties as may accrue to the party of the first part and will pay to the party of the first part one-half of his share of all moneys received by the said party of the second part.

Sixth. The party of the second part agrees not to distribute, sell, offer or expose for sale any copy of the said libretto and lyrics, piano and vocal score, or any part or portion of the said libretto, lyrics and scores or any arrangement or selection of the whole or any part thereof, without the signature of the party of the first part conspicuously stamped or impressed upon the title page thereof, either by the party of the first part personally or by his duly authorized agent, and the party of the second part agrees immediately after printing any such copy to submit the same to the party of the first part or his duly authorized agent for signature. The party of the first part agrees at all reasonable times, personally or through his duly authorized agent, to impress or stamp his signature on any

such copy as frequently as the party of the second part may reasonably require.

Seventh. The party of the second part further agrees that it will make regular settlements under this contract promptly on or about the fifteenth day of June and December in each year during the existence of said copyrights and that at the time of such settlement and payment, it will deliver to the party of the first part a full, true and itemized statement showing in detail all sales made by the party of the second part of any publication hereinbefore set forth and the royalties due said party of the first part at the time of such settlement.

Eighth. The said party of the second part agrees that it will keep or cause to be kept, books of account in which full and complete entry shall be made of all said publications printed and sold by the party of the second part and its agents and the said books shall at all reasonable times be open to the inspection of the party of the first part or his agent duly appointed in writing; and the said party of the first part or his attorney, shall have the right to examine any and all books of account of the said party of the second part containing any items, memoranda or information relating to the printing and sale of said publications, and to inspect and count the number of copies on hand.

Ninth. This contract shall not under any circumstances be considered as licensing the party of the second part to present or perform the said libretto, lyrics and musical score or any part thereof or granting any rights therein. [fol. 262] except the publication rights.

Tenth. The term "score" as used herein shall include any additional musical numbers that may be written for said play at any time.

Eleventh. It is expressly understood that no numbers written by any person other than the party of the first part shall be published as part of the said libretto, lyrics and musical score nor shall any such number be published with a title page like or similar to that of the musical score.

Twelfth. It is mutually agreed that the rights hereby granted to the party of the second part by the party of the first part are dependent upon the faithful performance by

it of all the covenants and conditions herein contained and the failure of the party of the second part or carry out or perform any of the covenants and conditions contained in this contract shall render its rights hereunder voidable at the option of the party of the first part and upon the party of the first part giving notice to the party of the second part terminating this agreement, then all rights which the party of the second part may obtain by virtue of this contract shall cease and terminate and shall at once revert to the party of the first part and shall belong to him as if this contract has never been made, without prejudice to any rights that the party of the first part may have by reason of any breaches of this contract; and in such event, or in the event of the bankruptcy or insolvency of the party of the second part or its abandonment of the music publishing business, the party of the second part agrees to immediately assign to the party of the first part in proper form, any and all copyrights which the party of the second part may have secured by virtue of this contract and at the same time to return all manuscripts belonging to the said party of the first part.

[fols. 263-270] In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

In presence of:

Victor Herbert (L. S.), M. Witmark & Sons, by Jay
Witmark, Treas. (Seal)

[fol. 271] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed March 3, 1938

Come now the Defendants, Cary D. Landis, individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida, O. C. Parker, individually, and as State Attorney for the Second Judicial Circuit of Florida, A. K. Black, individually, and as State Attorney for the Third Judicial Circuit of Florida, William A. Hallows, III, individually and as State Attorney for the

Fourth Judicial Circuit of Florida, J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida, Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida, J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida, Murray W. Overstreet, individually and [fol. 272] as State Attorney for the Ninth Judicial Circuit of Florida, L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida, G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida, Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida, J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida, John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida, Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida, "John Doe" and "Richard Roe"; by their undersigned Attorneys, and file this their motion to dismiss the bill of complaint heretofore filed herein for the following reasons, to-wit:

1. That the bill does not state facts sufficient to constitute a cause of action against the Defendants or any of them.

- 1-a. That there is no equity in the bill.

2. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the jurisdictional amount of \$3,000.00, exclusive of interest and costs, is not involved in this suit, in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers, an unincorporated association; and it does not affirmatively appear that the loss of any member of said society due to the enforcement of Chapter 17807, Laws of Florida, 1937, would amount to the sum of \$3,000.00, the [fol. 273] necessary jurisdictional amount.

3. That it affirmatively appears from the allegations of the bill of complaint that the bill is fatally ambiguous in failing to show whether the true party in interest is the

American Society of Composers, Authors and Publishers or its members.

4. It affirmatively appears from the allegations of the bill of complaint, and exhibits attached thereto, that this suit is not one arising under the Federal copyright laws, and that since the jurisdictional amount has not been shown to exist in each member of the said society, the Court does not have jurisdiction of the cause.

5. That it affirmatively appears from the allegations of the bill of complaint, and exhibits attached thereto, that the American Society of Composers, Authors and Publishers, an unincorporated association, cannot suffer any loss due to enforcement of Chapter 17807, Laws of Florida, 1937, due to the fact that it is an unincorporated association of composers, authors and publishers, and that all the proceeds which the said society collects from the licensing for public performances for benefit of the works of its members, and affiliated members, is divided between the members and affiliates, and, therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself.

6. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto that the jurisdictional amount of \$3,000.00 exclusive of interest and costs, is not involved in this suit, because the plaintiffs have not shown the extent of loss or damage they would [fol. 274] suffer by reason of the enforcement of said State law, as compared with the amount of profit they would make by the non-enforcement of said law.

7. That it affirmatively appears from the bill of complaint, and the exhibits attached thereto, that the plaintiffs have been guilty of laches, in that they have waited over nine months before bringing this suit to enjoin the enforcement of Chapter 17807, Laws of Florida, 1937.

8. That the Act in question, Chapter 17807, Laws of Florida, 1937, seeks by Section 1 thereof to prevent activity within the State of Florida of any combination of a substantial number of the owners or competitors of the copyrights of vocal or instrumental musical compositions when one of its objects is to fix prices or to restrain trade and competition in such musical compositions, or to prevent free compe-

tition among the owners or proprietors thereof, and that all of the provisions contained in Section 1 of said Act are within the powers of this State to enact into law.

9. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the plaintiffs and each of them are engaged in interstate commerce, and that they are violating the provisions of Title 15 U. S. C. A. Sec. 1 et seq., commonly known as the Sherman Anti Trust Act, and that, therefore, they have come into this Court with unclean hands, and equity will not grant them any of the relief prayed for therein.

10. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, [fol. 275] that the plaintiffs are engaged in intrastate commerce within the State of Florida, and that by reason of the unlawful combination through which they are operating they are violating the provisions of Section 1 of Chapter 17807, Laws of Florida, Acts of 1937, as well as the provisions of Chapter 6933, Laws of Florida, 1915, as amended by Chapter 10283, Laws of Florida, 1925, Section 7944-7954, inclusive, C. G. L. 1927, the general laws of Florida, prohibiting combinations or monopolies, such as the plaintiffs are engaged in, and that, therefore, the plaintiffs having come into a court of equity with unclean hands, they are not entitled to any of the relief prayed for in the bill of complaint.

11. That it appears from Chapter 17807, Laws of Florida, 1937, that Section 2-A to 2-C, inclusive, in no way conflicts with the provisions of the copyright laws of the United States, (Mar. 4, 1909 c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17 U. S. C. A.), but assures to the author, composer, publisher or proprietor the protection of the individual copyright by requiring persons purchasing the works of the authors, composers, publishers or proprietors to be used for public performance for profit, to pay the amount so designated thereon by the owner of said works.

12. That it affirmatively appears that Section 3 of Chapter 17807, Laws of Florida, 1937, which declares unlawful the enforcement within the State of Florida only said contracts of the unlawful combination in reference to copyrighted musical compositions, merely restates the common law and the general statutory law on this ground in force [fol. 276] in the State of Florida at the time of the passage

of this Act, as is indicated by Sections 7944-7954, inclusive, C. G. L. 1927, and that it is within the police powers of the Legislature of the State of Florida to so define, prohibit and prevent the enforcement of said illegal contracts.

13. That Sections 4-a, 4-b, 5-2, 5-b, and Section 6 of said Chapter 1708, Laws of Florida, 1937, are nothing more than the exercise of a valid police power by the Legislature of the State of Florida to protect persons, firms and corporations within the State of Florida from unlawful collections or exactions of royalties by the plaintiffs through a monopoly agency or affiliates of a monopoly should the monopoly seek to enforce or compel alleged rights to copyrighted music within this State in violation of the statute.

14. That Sections 7-a, 7-b and Section 8 of said Chapter 17807, Laws of Florida, 1937, do nothing more than define agencies and representation of such unlawful combination declaring the violation of this Act to be a felony and providing the punishment therefor, all of which definitions and requirements are within the right of the Legislature of the State of Florida to enact into law.

14. That Sections 9, 10-a, 10-b, 11-a and 11-b merely provide the procedure of how persons violating the provisions of this Act may be prosecuted, and they guarantee to any such persons the equal protection and due process of law by affording them a fair and impartial hearing before a legally constituted court of this State, and that the provisions contained in said Section are within the legislative [fol. 277] powers of the State of Florida to enact into the law.

16. That it affirmatively appears from the bill of complaint, and the exhibits attached thereto, that there is a misjoinder of parties plaintiff contrary to the provisions of Rule No. 26 as adopted by the Supreme Court of the United States, and as set forth in Title 28, Section 723, U. S. C., for the reason that said bill of complaint alleges no joint cause of action in said plaintiffs.

Cary D. Landis, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Andrew W. Bennett, Lucien H. Boggs, Of Counsel for Defendants.

[fol. 278] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DENY PLAINTIFF'S MOTION FOR INTERLOCUTORY
INJUNCTION—Filed March 3, 1938

Come now the Defendants in the above entitled cause, by their undersigned Attorneys, and moves the Court to deny Plaintiff's Motion for Interlocutory Injunction and for ground for said Motion say:

1. That the Court will consider each and every of the allegations of the motion to dismiss the bill of complaint as heretofore filed in this cause as grounds for the denial of the plaintiff's motion for interlocutory injunction.

2. That it affirmatively appears from the affidavits filed herein that the plaintiffs individually or jointly have not been threatened with prosecutions for violation of said Chapter 17807, Laws of Florida, 1937, and that if they [fol. 279] should be so prosecuted they have an adequate and complete remedy at law to protect their rights.

3. That it affirmatively appears from the affidavits filed herein that the plaintiffs will not under such circumstances be subjected to a multiplicity of suits or that they will in any way suffer an irreparable injury which they cannot be easily and adequately compensated for at law.

4. That it affirmatively appears from the affidavit filed herein that any loss or damage which the plaintiffs have suffered herein has been due to their own conduct, because they have failed and refused to accept payments tendered them under existing license in the State of Florida.

5. That no exceptional circumstances are shown which would allow a Federal Court to enjoin State officers from the prosecution of a State Criminal Statute because it affirmatively appears:

(a) That the plaintiffs have an adequate remedy at law.

(b) That the plaintiffs have not been threatened with prosecution for violation of said State Statute.

(c) That plaintiffs will, under no circumstance, be subjected to a multiplicity of suits.

(d) That plaintiffs are in no-immediate danger of great and irreparable injury or loss.

(e) That plaintiffs have been guilty of laches in that they have waited over nine (9) months since the passage of [fol. 280] this law to bring any action testing its constitutionality.

(Signed) Cary D. Landis, Attorney General;
(Signed) Tyrus A. Norwood, Assistant Attorney General; (Signed) Andrew W. Bennett, Lucien H. Boggs, of Counsel for Defendants.

[fol. 281] **Affidavits in Support of Motion to Deny Motion for Temporary Injunction**—Filed March 3, 1938

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CARY D. LANDIS, ATTORNEY GENERAL

This day personally appeared before me, the undersigned authority, Cary D. Landis, who, after being duly sworn, deposes and says that he is the duly elected and qualified Attorney General of the State of Florida, who, under and by virtue of the Provisions of Section 9 of Chapter 17807, Laws of Florida, 1937, must direct prosecutions; civil and criminal, for violations of said Act.

That, although he has been and is ready and willing to prosecute any violations of said Act, no violations thereof have been called to his attention, and, upon information and belief, avers that there has been no violation of said act in this State since its passage. That he has not, and has not authorized anyone on his behalf to, threaten anyone for the prosecution of said Chapter 17807, Laws of Florida, 1937.

(Signed) Cary D. Landis, As Attorney General.

Subscribed and sworn to before me this 28th day of February, A. D. 1938. Evelyn Davis, Notary Public, State of Florida at Large. My Commission Expires Mar. 7, 1939. (Seal.)

[Title omitted]

AFFIDAVIT OF W. WALTER TISON

W. Walter Tison, being duly sworn, deposes and says.

That he is the manager of radio station WFLA, located in Tampa, Florida, with additional offices in Clearwater, Florida; that said radio station first commenced operation about 1925 and has operated continuously since that time; that said station operates with a power of 5000 watts during the day time and 1000 watts at night pursuant to a license from the Federal Communication Commission; that the only radio station located in Tampa is station WDAE, owned and operated by The Tampa Daily Times; that said station commenced business prior to the establishment of radio station WFLA, and that it also operates with a power of 5000 watts during the day time and 1000 watts at night pursuant to a license from the Federal Communication Commission.

That radio station WFLA caters to the same potential listening audience in and about the City of Tampa, Florida, as radio station WDAE, and during the time of its existence, [fol. 283] it has been and continues to be in direct competition with said radio station WDAE in the sale of its broadcasting facilities to the radio advertising public located in the Tampa trade territory.

That radio station WFLA has a license issued by the American Society of Composers, Authors and Publishers, one of the complainants in the above entitled suit, which authorizes such station to perform any or all of the musical compositions owned or controlled by any member of said Society, or by any member of a foreign society affiliated with said Society, which license provides amongst other things that the said Society in its discretion and without any reason therefor may withdraw from public performance any copyrighted musical compositions coming under the provisions of said license.

That he has examined the form of license attached to the complaint herein as Exhibit F, entitled "Operator's Broadcasting License", and that the terms and conditions stated in said Exhibit are identical with the terms and conditions of the license of radio station WFLA except as to the amount of the fixed fee stated in Line 3, Paragraph 8 of said Exhibit

F. Under the terms of said license contract, radio Station WFLA is obligated to pay to said Society the 5 per cent of its gross income as set out in paragraph 8 of said Exhibit and in the letter dated January 15, 1936, attached thereto.

That the license agreement of radio station WFLA expired by its terms and was renewed by mimeographed form of letter dated January 15, 1936, in the same wording as the letter which is a part of the aforesaid Exhibit F of complainants.

On January 1, 1936, the music publishers, Harms, Inc., Remick Music Corporation, M. Witmark and Sons, and several others, all of which were members of the complainant Society and were owned or controlled by the Warner [fol. 284] Brothers Picture Corporation (hereinafter called Warner subsidiaries) withdrew from membership in the Society; that the withdrawal of the Warner subsidiaries from membership reduced the copyrighted musical compositions coming under the Society's license by approximately 40 per cent of those copyrights which were primarily required for performance purposes prior to January 1, 1936, that the purpose and subsequent effort of the Warner subsidiaries was to license the public performance of its copyrighted musical compositions independently of said Society. A strenuous effort was made to persuade the complainant Society to reduce the amount of fee or royalty fixed and determined by it to an amount commensurate with the loss of copyrights occasioned by the withdrawal of the Warner subsidiaries. The complainant Society refused to make any reductions in the fees demanded by it, but insisted that the same fees be paid for the depleted material. Radio station WFLA received a telegram from complainant Society, dated January 10 or 11, demanding that the station accept the Society's offer not later than January 15, and that if such acceptance was not received on or before January 15, said Society would proceed to prosecute station WFLA for infringement in respect to the broadcast of any copyrighted musical composition controlled by said Society. Because of the fact that it is and has been impossible to operate a radio broadcasting station "in the public interest" as is required by the Federal Communication Commission license without performing some of the copyrighted musical compositions controlled by the Society, Radio Station WFLA was compelled to accept the demands of the Society and re-

new its license for the depleted repertory of the Society [fol. 285] upon the same terms and conditions and for the same fees which should have paid for both the copyrights acquired by it under the renewed license and also the copyrights controlled by the Warner subsidiaries. The demands as made by the complainant Society to all radio broadcasting companies is set out in the "Report on Copyright", dated February 18, 1936 of the National Association of Broadcasters, referred to on page 28 of the affidavit of Gene Buck in support of the motion for a preliminary injunction. Attached hereto and made a part hereof is a complete printed copy of the "Report on Copyright", referred to by the complainant Buck.

As heretofore stated, it is impossible for radio station WFLA to operate without performing some of the copyrighted musical compositions controlled by the complainant society, and under the terms of the contract demanded by the Society from said station, the station must pay to the complainant Society 5 per cent of its income whether copyrights controlled by the Society are used in a particular program or whether copyrights controlled by some outside party are used. Under such circumstances the said station can not economically afford to acquire a license from any copyright owner other than the license from the Society and pay such other copyright owner for the use of his material. To make such payment to any other copyright owner would mean that said station would be compelled to pay additional sums over and above the percentage demanded by the Society. Under such circumstances the station must and does refuse to acquire licenses to perform copyrighted musical compositions from any individual or group of individuals other than the said complainant Society.

Subsequent to January 1, 1936, representatives of the Warner subsidiaries above referred to attempted to license the use of their copyrighted compositions to said radio station WFLA, but for the reasons above stated, said station refused to acquire said license. On August 1, 1936, the Warner subsidiaries reentered the complainant Society as members thereof, and gave up its efforts to function independently of said Society, and thus again incorporated all musical catalogs under the said Society's license.

[fol. 286] Attached hereto and made a part hereof is a photostatic copy of a certificate issued by the Copyright

Office of the United States which sets forth the total number of registrations of copyrighted renewals from January 1, 1909 to December 31, 1936, inclusive.

The said complainant Society through various of its officers has repeatedly claimed that it controlled substantially all of the usable copyrighted music in the United States. However, at no time has radio station WFLA, or so far as your deponent knows, has any radio broadcasting station or other user of copyrighted music been able to obtain a complete or even substantially complete catalog of the copyrighted musical compositions for which ASCAP demands its fees. In other words, radio station WFLA and so far as your deponent knows every other user of copyrighted music has been compelled to accept ASCAP'S demands without definitely knowing exactly what was being purchased. Moreover the burden of determining whether a particular musical composition comes under the purview of the complainant Society's license heretofore has been and still is upon the user.

Checks of registrations of copyrighted musical compositions in the office of the Register of Copyrights, Washington, D. C. indicate that approximately 60 per cent of all the published copyrights in the United States are under the control of said Society. This means that the Society probably controls the performance rights of approximately 400,000 copyrighted musical compositions. Manuscripts as distinguished from published copyrights are not generally available to a user of music for performance purposes since such manuscripts are not offered for sale and do not become [fol. 287] available for the use of the general public until such time as they are published. When a manuscript is published for general distribution, it is entered in the copyright office as a published copyright and becomes part of the copyrighted music of the country.

(Signed) W. Walter Tison.

Subscribed to and sworn to before me this 27 day of February 1938. Evelyn Davis, Notary Public, State of Florida at Large. My Commission expires March 7, 1939. (Seal.)

The National Association of Broadcasters

NATIONAL PRESS BUILDING * * * * * WASHINGTON, D. C.
JAMES W. BALDWIN, Managing Director

NAB REPORTS

Copyright, 1936. The National Association of Broadcasters

Special
FEBRUARY 18, 1936

REPORT ON COPYRIGHT

Submitted to the Board of Directors at a meeting held in Chicago, Illinois, February 3, 1936

To the Board of Directors of the National Association of Broadcasters:

You have been called to this meeting held February 3, 1936, primarily for the purpose of considering questions of vital importance to the broadcasting industry in the field of copyright. To assist in your determination of these questions, I have prepared this report setting forth the facts as I find them, and closing with certain conclusions and recommendations submitted for your consideration.

By resolution adopted on December 17, 1935, at your last meeting, you conferred broad authority on me to negotiate in behalf of independently-owned stations for copyright licenses. Pursuant to that resolution, over 300 broadcasters gave me powers of attorney to act for them in the crisis which was at hand. This response far exceeded the fondest hopes even of those who voted for the resolution, and represented a unified action in the broadcasting industry beyond anything yet seen. Further pursuant to that resolution, I assembled an advisory committee which I am sure you will agree was truly representative of various classes of independent stations and was composed of able and conscientious men. These men worked long and laboriously with me through two sessions in New York, one of them from December 27 to December 31, 1935, and again on January 10-11, 1936, and I had the constant advice and assistance of several of them in the interim between the two sessions.

Notwithstanding these facts, I regret to report that, so far as ASCAP is concerned, the result was a complete and humiliating failure. This fact is a challenge to the Officers and Directors of the NAB, and to every broadcaster in the United States. How did it come about that the combined negotiating power of over 300 broadcasting stations (including most of the larger independent stations) could be not only utterly ignored but be treated with contempt? One of the principal purposes of this report is to set forth and analyze the facts to determine the answer to this question. This, it seems to me, is necessary in order to decide upon the future course of action of the NAB in the field of copyright, and to avoid any mistakes that may have been made in the past.

In Parts VII and VIII of this report I have set forth my conclusions and my recommendations and shall not anticipate them in detail here. It is necessary, however,

to say a word in advance. Whatever approach is made to the study of the causes of the repeated failure of NAB negotiations with ASCAP, the path leads inevitably to certain basic causes which are familiar to everyone, such as ASCAP's monopolistic power, combined with lack of availability of sufficient non-ASCAP music and with defects in the copyright law. More recently, however, there has been added to these basic causes a factor so important as to have been well nigh a determining influence in all negotiations. I refer to the discriminatory contracts enjoyed by the two national network companies, combined with the power indirectly given to ASCAP by the contracts which those companies have with affiliated stations, under which the latter are obligated to have ASCAP (and other) licenses. As I shall point out, this factor (in addition to the basic causes) more than anything else brought about our recent defeat, and will continue to stand in the way of success of any fair and equitable copyright program NAB may adopt, whether it be per-piece, measured service, or some other kind of system.

If I am correct in this conclusion, then, if NAB is to continue to function in the field of copyright and fairly to represent the great majority of its membership, among its principal objectives should be

1. Elimination of all discriminations in contracts with ASCAP and other licensing pools.
2. Elimination of the requirement in network-affiliate contracts that affiliate stations have licenses from ASCAP or any other licensing pool.
3. Clearance of copyright at the source on network programs, to the end that the network is responsible for the obtaining of licenses and the payment of fees on network programs broadcast by affiliate stations.

Obviously, in the absence of assent by the network member stations of the NAB, these objectives cannot be striven for without a division in the ranks of the Association with all the consequences this would entail. On the other hand, these objectives cannot be ignored without forcing upon the great majority of independent stations a realization that to have any measure of success in future copyright negotiations they must unite outside of NAB and act independently of it. As I see it, the issue for them is not whether they shall or shall not have a per-piece or measured service plan (although, in view

of the fact that the NAB has gone on record in favor of such a plan at its last three conventions, this issue is extremely important). The issue is, whether they are to have *any voice whatever* in determining what agreements they will enter into with licensing pools. So far they have been denied that voice.

Broad as were the powers given me by the resolution of December 17, 1935, I do not construe them as authorizing me definitely to commit either the Board or the Association to either course. It seems to me that a choice must quickly be made between

1. a comparatively innocuous course avoiding any issue wherein the interests of the networks are opposed to those of the independent station, and

2. a militant course which would include the objectives above set forth.

This report is, therefore, also a request for instructions from the Board of Directors by whom I am employed and to whom I am responsible. It may be that the Board will feel that this issue is so far-reaching that it should be submitted to the membership either at the next Annual Convention or at a Special Meeting to be called at an earlier date.

In view of the importance which attaches to the discriminatory contracts, I have, at some length, summarized their nature, their history and their effect on our negotiations, in order that, as nearly as is in my power, the correct facts shall be before the Board. Other headings included in this report explain themselves.

I. ANALYSIS OF TOTAL COPYRIGHT FEES PAID BY BROADCASTERS IN 1935

This analysis is of fundamental importance to an understanding of the present situation. First, it explains the basis for one of the principal complaints against ASCAP by the overwhelming majority of independent broadcasters, as well as the principal obstacle to negotiation of a per-piece or measured service plan. Second, it explains one of the principal reasons leading to the withdrawal of the Warner Brothers group of music publishing houses from ASCAP, i.e., that, because of the discriminatory contracts in favor of the networks, a large portion of the broadcasting industry's net receipts is escaping the payment of fees for the use of copyright music.

For the sake of simplicity and because of lack of data on other licensing organizations, this analysis will be confined largely to copyright fees paid to ASCAP, and will be made in round numbers.

The broadcasting industry paid ASCAP approximately \$2,995,000 in 1935, or, in round figures, \$3,000,000. Of this sum about \$850,000 consisted of sustaining fees, and about \$2,150,000 of fees paid on so-called net receipts of broadcasters on commercial programs. The sum of \$2,150,000 represents 5% of \$43,000,000. The term "net receipts," as defined in ASCAP contracts, refers to the full amount paid to the broadcaster for the use of his broadcasting facilities after deducting commissions not exceeding 15%, if any, paid to advertising agents or

agencies not employed or owned in whole or in part by the broadcaster. Even if it be assumed that 15% has been paid in all cases (which is, of course, not the fact), net receipts of \$43,000,000 would correspond to less than \$51,000,000 of gross receipts.

The fact is that, as nearly as can be calculated on the basis of data now available, the gross receipts of the broadcasting industry for 1935 were about \$87,500,000 and, if a 15% commission were deducted in all cases (which, as already stated, is not the fact), the net receipts were about \$74,000,000. From these figures it is clear that about \$30,000,000 or more of net receipts (corresponding to about \$35,000,000 of gross receipts) is escaping the payment of copyright fees.

The overwhelming majority of independent broadcasters are paying ASCAP 5% of their net receipts and the discrepancy is not due to them. The discrepancy is due primarily to the discriminatory contracts mentioned at the outset.

Let it be assumed that \$74,000,000 represents the net receipts of the broadcasting industry and that \$2,150,000 represents the sum (exclusive of sustaining fees) paid to ASCAP for the year 1935. If the entire broadcasting industry were paying on a uniform non-discriminatory percentage basis, each broadcaster would have paid 3% of his net receipts (instead of 5% as at present). If sustaining fees were abandoned and all fees reduced to a percentage basis, the total of \$3,000,000 received by ASCAP in 1935 would represent about 4% of each broadcaster's net receipts (instead of 5% plus a large sustaining fee as at present). If the percentages be figures in terms of the gross receipts of \$87,500,000, each broadcaster need have paid only about 2.5% plus his sustaining fee, or less than 3.5% without any sustaining fee.

The discriminatory ASCAP contracts, so far as they are known, consist (1) principally in the contracts of the two national network companies, and, to a much smaller extent, (2) in the contracts of about 48 newspaper-owned stations, and (3) the contract of WCAU, Philadelphia. The nature of the discriminations will be briefly described.

1. *The Network Contracts.* The two national network companies (NBC and CBS) pay nothing to ASCAP as networks. Each company pays a sustaining fee plus 5% of net receipts with respect to each station owned or controlled by it, NBC with respect to 14 stations (KDKA, KGO, KOA, KPO, KYW, WBZ, WEA, WENR, WGV, WJZ, WMAL, WMAQ, WRC and WTAM) and CBS with respect to 7 stations (KMOX, WABC, WBBM, WBT, WCCO, WJSV and WKRC).

Neither company pays any sustaining fee or percentage of net receipts on revenue received from advertisers for the facilities of affiliated stations, not owned or controlled by the network company. For example, Station A, independently owned but affiliated with NBC, may have a rate of \$300 an hour at which rate its facilities are sold by NBC to a network advertiser. Of this \$300, NBC pays only \$50 to Station A and keeps \$250. Station A pays ASCAP 5% of the \$50 received by it; NBC pays ASCAP nothing on the remaining \$250.

Furthermore, neither company pays 5% on the total net receipts even of its own stations. By a process of bookkeeping or by use of subsidiary corporations, only a portion of what is paid by a network advertiser is credited to these stations and subjected to the 5% fee. For example, Station B, owned by NBC, may have a rate of \$1200 an hour at which rate its facilities are sold by NBC to a network advertiser. Of this \$1200, NBC may credit the station with only \$400 and retain \$800 as "network" receipts. NBC pays the 5% fee only on the \$400.

While complete exact figures are not available (due in part to the unwillingness of the networks to supply them), sufficient are at hand to give some idea of the amount of net receipts which thus escape taxation by ASCAP. The following figures show what was actually paid to ASCAP by the two national network companies during 1934 and during the first six months of 1935.

	1934		
	Sustaining Fee	Advertising Fee	Total
NBC	\$173,500.00	\$137,541.96	\$311,041.96
CBS	68,500.00	106,778.44	175,278.44
Total	\$242,000.00	\$244,320.40	\$486,320.40

¹ One of NBC's 14 stations, KYW, was not acquired until December 3, 1934.

	January 1-July 1, 1935		
	Sustaining Fee	Advertising Fee	Total
NBC	\$ 89,250.00	\$ 89,794.79	\$179,044.79
CBS	34,249.92	68,633.06	102,882.98
Total	\$123,499.92	\$158,427.85	\$281,927.77

Multiplying the six-months figures by two, we arrive at the following payments made by the two national network companies to ASCAP in 1935:

	Sustaining Fee	Advertising Fee	Total
NBC	\$178,500.00	\$179,589.58	\$358,089.58
CBS	68,499.84	137,266.12	205,765.96
Total	\$246,999.84	\$316,855.70	\$563,855.54

According to the above figures, the two network companies paid substantially \$247,000 out of the total of \$832,000 in sustaining fees received by ASCAP from broadcasting in 1934, or 29.7%.

According to the above figures, the two network companies paid substantially \$317,000 out of the total of \$2,150,000 in advertising fees received by ASCAP from broadcasters in 1935, or 14.7%. The sum of \$317,000 represents 5% of \$6,340,000 net receipts.

It is now appropriate to compare the total net receipts of the two national networks with the total net receipts of the rest of the broadcast industry. Exact figures for the net receipts are not available and a calculation must, therefore, be made on the basis of gross receipts (gross time sales). Even these involve an approximation since

exact figures for the month of December are not yet available. The gross and net receipts for 1935, thus calculated, are as follows:

	Gross Receipts for 1935	
	1st 6-mos.	Total
National Networks	\$26,120,410	\$50,067,686
Regional Networks	465,899	1,110,739
National non-Network	8,591,053	17,063,688
Local	9,898,610	19,281,735
Total	\$45,075,972	\$87,523,848

The national network business, therefore, represents slightly over 57% of the total broadcasting business for 1935. At this point, however, we meet with a lack of information which makes it difficult to reach even approximate conclusions. It is not known how much of the net receipts of the national networks are (a) paid over to affiliate stations, or (b) paid over or credited to stations owned or controlled by the networks. It is also not known how much of the national non-network and the local receipts represent receipts on business of stations owned or controlled by the national network companies. Even with the making of liberal allowances, however, it seems clear that at least the sum of \$25,000,000 (and probably more) of national network net receipts is escaping the payment of any tax to ASCAP. Or, to state the matter in another way, the national network companies are paying ASCAP only about 1% of their net receipts, in contrast to the 5% paid by independent broadcasters.

2. *The Newspaper Contracts and the WCAU Contract.* While the discriminatory features in these contracts permit the licensees to escape a certain amount of the burden borne by other stations, the amount of saving is not known. In any event, the total saving is not large enough so that elimination of the discriminations would make possible any material reduction in the percentage paid by other stations.

II. ORIGIN OF DISCRIMINATORY ASCAP CONTRACTS

For some years prior to 1932 broadcasters paid ASCAP on the basis of flat annual license fees, payable in monthly installments. The total paid ASCAP in 1932 was approximately \$960,000. The licenses were for short term periods, such as a year or two; the end of each period brought a bitter controversy and almost invariably an increase in fees. While undoubtedly ASCAP attempted in a general way to relate the size of the fee to the importance of the station there was little uniformity and the amounts paid by stations were kept secret. Such discriminations as there were, however, are irrelevant to the present discussion.

In the latter part of 1931, as licenses terminated, renewals were placed on a month-to-month basis and ASCAP let it be known that it was working out a new system of fees. On April 11, 1932, the new basis was

announced by E. Claude, Mills, General Manager of ASCAP, effective June 1, 1932, as follows:

Sustaining License

"At approximately present rates, with such readjustments either upward or downward as will equalize the fee paid by stations operating under similar or equal conditions * * *"

Commercial License

"At 5% of the amounts charged for use of the facilities of the station in respect to all commercially sponsored non-network programs. In the case of network programs, the fee of 5% is payable by the key station based upon the gross amount charged for use of broadcasting facilities * * *"

Thus it will be noticed ASCAP's first proposal recognized that in network programs copyright should be cleared at the source. At that time it was estimated that the gross receipts of the broadcasting industry were between \$50,000,000 and \$60,000,000. The proposal therefore meant an increase in the total fees to be paid ASCAP of over 300%.

An emergency meeting of the NAB Board was held in New York April 18-19. As a result of conferences with Mills a moratorium until September 1st was decided upon in order to permit negotiations. A special copyright committee was appointed by the NAB Board to carry on negotiations with ASCAP, consisting of Morency, WTIC, Chairman; Ashby, Vice President of NBC; Kläuber, Vice President of CBS; Cummings, WOAI; and Shaw, WMT. Cummings and Shaw were thereafter unable to be present or to participate in the committee's work, so that the committee in reality consisted of Morency, Ashby and Kläuber. A plenary committee was created to survey the entire music situation. The NAB addressed a formal communication to ASCAP in which it refused to accede to the ASCAP proposal and pointed out, among other things, the unsoundness of the proposed basis for assessing fees, particularly with respect to programs in which no use is made of copyrighted music controlled by ASCAP.

The negotiating committee thereupon proceeded to have conferences with ASCAP representatives. The plenary committee considered a survey of music in the public domain as well as a study of the foreign music copyright situation. Oswald F. Schuette was engaged as a sort of generalissimo, with his principal duties on the legislative front. Since the legislative history of this period, while important, is of only incidental relevancy to this discussion, it will be passed over. A further meeting of the NAB Board was held in Chicago on May 24th. A special meeting of the NAB negotiating committee, the plenary committee and others (including the presidents of the two networks) was held in New York on July 6th. No progress, however, had yet been made by the negotiating committee.

Finally, Mills and the NAB negotiating committee worked out a proposition whereby the broadcasters would

pay a flat increase of 25% for one year beginning January 1, 1933, during which period a legislative truce in Congress would be declared and further negotiations would be undertaken towards an acceptable basis. The NAB Board was called into a special session in New York on July 21st. It rejected the proposal, principally because of the provision for legislative truce, and made a counter-proposal calling for a 25% increase for two years during which time a joint committee of the NAB and ASCAP would cooperate in drafting a scale based on a "per-piece" arrangement. This proposal was submitted to Mills on July 26th by the Negotiating Committee and was rejected by the ASCAP Board on the following day, apparently by a very close vote.

On July 28th Mills made an announcement virtually breaking off negotiations. Orally, however, he announced new terms consisting of a modification of the proposal first made on April 11th. These terms consisted of a sustaining license fee, as previously proposed, plus a percentage of gross receipts for a period of three years, the percentages being 3% the first year, 4% the second year and 5% the third year. The same principle was followed with respect to network programs as in the proposal of April 11th; namely, that the networks should bear the entire cost on network programs, in other words, that copyright should be cleared at the source. In response to a letter from the NAB Negotiating Committee, Mills indicated willingness to reopen negotiations by letter dated August 3rd, in which he stated the modified proposal in written form.

What happened between this date and August 24th is a matter of speculation. A meeting of the NAB Board was held on August 24th in New York and at that meeting the Negotiating Committee presented another proposition from ASCAP with the following recommendation:

"The committee believes that the foregoing settlement is the most favorable that can be reached and recommends that the Board accept it and recommend its acceptance by the independent stations."

This final proposal was the same as that announced by Mills on July 28th with one very important exception. The exception was that the networks would not pay anything on their receipts as networks but would pay only royalties on the net sales of each station owned and operated by them, whereas network affiliates would pay the percentage rate on their receipts on network as well as on non-network commercial programs. After a tumultuous session the Board voted acceptance of the report, with four representatives of independent stations not voting. A number of the Directors that voted for it did so only because under the circumstances they felt they had no alternative.

In the course of the weeks that followed more favorable contracts were also negotiated by a group of newspaper-owned stations. Under the terms of these contracts the newspaper-owned stations were to pay (1) a sustaining fee of 50% of the fee previously paid; (2) 3% of receipts up to an amount equal to 50 times the sustaining

fee, and 5% of receipts above that amount, and (3) in any event, a minimum fee of not less than 4 times the sustaining fee.

WCAU, Philadelphia, also negotiated a more favorable contract. In its case the percentage is based on receipts from programs using music and the contract contains other advantageous provisions, consisting chiefly of a low sustaining fee and the privilege of deducting legitimate salesmen's commissions.

While a number of incidental facts are in doubt and open to controversy, the conclusion is inescapable that during the final hours of the negotiations the NAB Negotiating Committee directed its efforts toward relieving the networks of the burdens that would have fallen on them under Mills' proposal of July 28th, and transferring a substantial share of this burden to the independently-owned affiliate stations. Under these circumstances it is not surprising or open to serious criticism that in their later negotiations other stations, including the newspaper group, attempted to secure concessions. In fairness to the newspaper group it should be stated that its leaders and spokesmen have regularly proved willing to cooperate with other independent stations in the attempt to obtain from ASCAP a per-piece or a measured service plan available to all stations on a non-discriminatory basis. So far as publicity is concerned (including the allegations in the government's suit against ASCAP), however, the newspaper contract has been the chief target as an example of discrimination, while comparatively little has been printed about the much greater discrimination involved in the network contracts which, as hereinafter shown, were fundamentally responsible for the recent failure in NAB's negotiations with ASCAP.

III. RENEWAL OF THE DISCRIMINATORY CONTRACTS IN JUNE, 1935.

Assurances given by Mills in 1932 that the forced acceptance of the new ASCAP contracts did not foreclose further negotiations and that ASCAP stood ready to consider a revision at any time were, with minor exceptions, not borne out by later events. On October 10, 1932, ASCAP did announce that it would not require payment of royalties on political speeches, the national election campaigns being then in full progress, and, in the case of many of the smaller stations, there were reductions in sustaining fees, the total reduction, however, not amounting to very much.

During the fall of 1932, Mills assured Schuette that he was willing, subject to the approval of the ASCAP Board, to limit royalties to programs using ASCAP music, but on November 2nd the ASCAP Board went through the familiar process of refusing to ratify the proposal. Tactics such as these were to be repeated over and over again during the ensuing three years, principally on occasions when ASCAP had reason to fear some concerted or effective action on the part of the broadcasting industry and desired to delay such action.

At the NAB Annual Convention, held in St. Louis on November 14-16, 1932, Schuette was given broad authority and a resolution was unanimously adopted declaring that

"the composers and publishers are entitled to fair compensation, measured in proportion to the actual use of their compositions"

and, by other actions, the basis was laid for the three-point program of the NAB discussed under a later heading, which was formally put into motion at a NAB meeting held in New York on April 5, 1933.

Immediately after the Convention Schuette made a proposal that royalties be 4% of revenue from programs using ASCAP music, plus a sustaining fee. Mills responded that action on this proposal must await an ASCAP Board meeting in January. In a letter dated January 18, 1933, Mills offered to reopen negotiations but declared that under no circumstances would he deal with Schuette (who was sending out some rather vigorous circulars to all stations, having to do principally with "plugging" and "restricted" ASCAP numbers).

On January 24, 1933, announcement was made that Hon. Newton D. Baker had been retained and on February 20-21, 1933, an NAB Board meeting was held in Washington at which Mr. Baker's partner, Mr. Hostetler, was present and stated his plans for future activity. It was decided that Schuette's work was henceforth to be confined principally to the Radio Program Foundation proposal. Mills immediately extended an invitation to Baker to enter into negotiations. These negotiations came to an abrupt end on April 4, 1933, when at a meeting with Hostetler, Levy and McCosker, Mills announced point blank that there would be no revision of the contracts except upward.

Immediately after the NAB Board meeting of April 5, 1933, when the three-point program was definitely decided upon, Mills communicated with Baker and informed him that he was again ready to talk over matters. Baker replied on April 6th that he would be willing to talk only if it were understood in advance that the basis would be in the direction of a per-piece plan and that, during the working out of such a plan, the present scale would be amended so that royalties would be paid only on programs using ASCAP music. The ASCAP Board met to consider this proposition April 27th. It turned the matter over to its general counsel, Nathan Burkan, while Mills departed for Europe.

From that time on, for a period of two years, while there were occasional conversations, no progress whatsoever was made in negotiations with ASCAP and nothing occurred in connection with these negotiations that would add to the picture given by the foregoing account. This brings us to the early Spring of 1935.

Before resuming the story of the negotiations at this point, I must call your attention to the situation as a whole in April, 1935. I do this because of some of the statements which have been so widely made as to the reasons for events which took place the following June,

and the charges that those who have worked for the per-piece or measured service plans have been "dividing the industry."

First, let us consider the per-piece or measured service plan. It had been endorsed by the NAB at the St. Louis Convention in November, 1932, after a proposal made by Schuette for a measured service plan had been turned down by ASCAP. It was endorsed again by the NAB at the White Sulphur Springs Convention in October, 1933. It was endorsed again by the NAB at the Cincinnati Convention in September, 1934. It was endorsed again by the NAB at the Colorado Springs Convention in July, 1935. Throughout this period the plan was expressly or impliedly endorsed at many meetings of the NAB Board of Directors, among which need be mentioned only the meetings held in Washington, May 14, 1934, and in New York on June 22, 1935. It was the basis of all negotiations with ASCAP conducted, first by Schuette and later by Baker and Hostetler, for the entire three-year period, and this fact was made clear beyond question in reports made by Hostetler and others at the White Sulphur Springs, the Cincinnati, and Colorado Springs Conventions. Prior to the Spring of 1935, either expressly or tacitly the two networks and Levy gave approval to what was being done by Hostetler and others negotiating in behalf of the industry. Large contributions were sought from and made by independent stations, as well as by the networks and Levy, for the carrying forward of the program of which this was an integral part. The Government suit against ASCAP, instituted August 30, 1934, had, as one of its principal express purposes, a reorganization of ASCAP so as to establish a system of fees based upon actual use of music and competition between copyright-owners. This was thoroughly explained to and understood by the NAB membership.

Secondly, we should note the progress which had been made on the NAB three-point program by the Spring of 1935. With reference to the Government suit against ASCAP, the Government had won an overwhelming victory on March 26, 1935, when the Court granted the Government's motion to strip the case of irrelevant issues and denied ASCAP's motion seeking to delay trial by permitting the taking of depositions all over the world. By the second week in May, it was clear that trial would be had at an early date, beginning on June 10th. On the legislative side, the Duffy Copyright Bill was moving slowly but surely toward enactment, it being certain by the second week in May that it would be favorably reported by the Senate Patents Committee and would eventually be passed by the Senate. A surprise attempt to commit the United States to the International Copyright Convention had been frustrated and on April 22, 1935, the Senate had rescinded its ratification of that treaty. The only point in which no recent progress had been made was that represented by the Radio Program Foundation, which had lain dormant for a year or more. In addition to all this, ASCAP was torn with internal dissensions and a number of its important members were threatening to withdraw as of December 31, 1935. There was even talk

among some of them of the per-piece plan and there was open talk of a consent decree in the Government suit. As early as December, 1932, it had been reported that ASCAP was working out a revised system of distributing royalties to its own members based on a per-piece plan.

On the whole, therefore, it may be said that never before had the broadcasting industry been in as strong a position to demand justice from ASCAP as it was in the Spring of 1935. By June 1, 1935, it was possible for comments to be made such as appeared in the issue of *Broadcasting* for that date, such as the editorial caption "Old ASCAP—Last Curtain," and the statement "ASCAP appears to be on its last legs as the hard-hearted music trust." Proof of this, if proof is necessary, is furnished by the fact that shortly prior to April 26, 1935, ASCAP invited the broadcasters into a conference which was held that day. With this conference the all too familiar tactics of the past began once more. In behalf of the NAB Hostetler made it clear that any agreement reached must be acceptable to the Government; also, that NAB was on record in favor of a per-piece or measured service plan and that such a plan was contemplated in the Government suit. A six-months' license extension under present terms was suggested, contingent upon any action taken in the Government's suit. The ASCAP spokesmen promised a recommendation to that effect to the ASCAP Board, but it was later turned down.

A meeting of the NAB Copyright Committee was held in New York May 13th. It was understood that representatives of both the broadcasting industry and ASCAP would meet at noon for further discussions to work out a temporary arrangement. There were present McCosker, Chairman of the Copyright Committee; Ward, NAB President; Allen, WLVA; Klauber, CBS; Ashby, NBC; Damm, WTMJ; Russell, NBC; Levy, WCAU; Loucks, NAB Managing Director; and Hostetler. Bennett, special assistant to the Attorney General in charge of the ASCAP suit, was called in. There is a marked difference of opinion as to whether Bennett did or did not make certain statements. According to Levy's statement made later (in the Convention in July), Bennett had said in substance that it would jeopardize the Government's case if the NAB were to ask for anything except an extension of the present contract, and particularly if the NAB were to ask for and secure a more favorable contract. Hostetler has no recollection of Bennett's saying that nothing better could be accepted. Among the others, some apparently corroborate Levy and some Hostetler. Several months later the Department of Justice, through the Hon. John Dickinson, addressed a letter to NAB stating that it is not, and never has been, the position of the Department of Justice that a better contract should not be sought.

In any event, at the meeting with ASCAP that day, ASCAP offered a straight five-year extension. Hostetler opposed this on the ground that it would affect the Government suit adversely. At a meeting held May 23rd the NAB Copyright Committee rejected the proposal and made a counter-proposal of extension of all existing contracts until the conclusion of the litigation. According

to Levy, Bennett had advised the Committee that if this were turned down by ASCAP the broadcasters would then be in the position of having been coerced into accepting the five-year extension and the extension would not be prejudicial to the Government's case. The chairman of the ASCAP committee agreed to submit the proposition to the ASCAP Board, with a reply expected the following week. The ASCAP Board not only rejected the proposal but, pursuing the oft-repeated tactics of the past, sought to alarm the broadcasters by withdrawing the offer of a straight five-year extension.

In the meantime, on May 20, 1935, Loucks, NAB Managing Director, had reached an agreement with Mills for an extension of all licenses from their expiration date, September 1, 1935, to January 1, 1936. This date coincided with the date on which the existing contracts between ASCAP and its members were to expire. The form of extension was approved and, by public announcement in the *NAB Bulletin* (as well as in *Broadcasting*), broadcasters were advised that they might execute and return the extensions.

During this same period there were other proposals made and informally discussed, as to which the record is not clear enough to justify my attempting to describe them. With possibly one or two exceptions, they do not add anything to the picture as a whole. At one point Mills made a proposal which, in the judgment of Hostetler and his associates, was simply intended to divide the industry by arraying the independent stations against the networks, and which therefore was not submitted to broadcasters generally. Failing in this, he apparently decided to pursue the opposite tactics and, by dealing with the two networks and WCAU, to array them against the independent stations. At least, that is what he succeeded in doing and, as is well known to those who have had dealings with him, he has frequently asserted that such was his intent.

It should be noted at this point that during this entire period at least one and probably both of the networks were negotiating for the purchase of the Warner Brothers group and perhaps other publishing houses. I am informed that these negotiations were broken off on June 2, 1935. The fact of these negotiations was not, so far as I know, communicated to the officers, directors or copyright committee of the NAB.

On June 3, 1935, a meeting of the copyright committee was held on short notice in New York. A quorum was not present. Those present were McCosker, Russell, Levy, Klauber, Colin, Kaye, Ashby, Sprague, Loucks, and Hostetler. Mills sent over a proposal contemplating a five-year renewal based on the available catalog rather than on the present catalog, i.e., on whatever catalogs ASCAP happened to have. This, of course, raised a question as to the effect of the threatened withdrawal of the Warner Brothers group. By about 6 p. m.; on that date, no progress had been made. Hostetler and Loucks still opposed a straight five-year extension; Levy and others were in favor of it.

Finally, Levy telephoned Mills and asked whether ASCAP would agree to a straight five-year extension. Mills assented. The Committee, after discussion, came to no decision. Levy then informed the Committee that he would meet with ASCAP the following morning and arrange for a five-year extension for his station. He also stated that he would send out a letter to all broadcasters informing them of his action and advising them to do likewise. Hostetler told Levy that if he sent such a letter he should inform all stations of the advantageous features of the WCAU contract. According to Hostetler, Levy said he would. According to Levy, Levy said it was unnecessary since the WCAU contract was well-known, its terms having been voluntarily disclosed at the St. Louis and later Conventions. In any event, it was Hostetler's and Loucks' understanding that McCosker was to get Mills' offer in written form so that it could be submitted to the Copyright Committee and in turn to the NAB Board before it was executed.

The following day Hostetler and Loucks waited at the St. Regis Hotel until about 3:30 p. m. when they had to leave to catch a train for Washington. On arriving in Washington in the evening they learned for the first time that during the day, Levy and the two networks had concluded 5-year extensions of their contracts from January 1, 1936, Levy's contract being renewed without change, and the network contracts being subject to an increase in sustaining fees of \$25,000 each for three of their stations (WEAF, WJZ and WABC). Late in the afternoon Levy had advised Bennett of these renewals by telephone to Washington.

Hostetler, arriving in Cleveland on the morning of June 5th, immediately sent Loucks a letter summarizing his recollection of the understandings at the meeting of June 3rd and expressing his views on the actions of Levy and of the networks. Levy sent out a letter to all stations informing them of the extensions, and advising them to do likewise. He gave, as reasons for the advice, that the Government suit would not be terminated for several years, and that the suit would in no wise be affected by a 5-year extension. He mentioned that Hostetler and Loucks held contrary views to his, but was silent on the subject of the WCAU contract. Thereupon, Loucks circulated the material portions of Hostetler's letter. On June 11th, Levy sent out a second letter, setting forth his views at length. In addition to defending his failure to mention the WCAU contract and reiterating his contention that the Government's suit could not possibly be prejudiced, he asserted that the Copyright Committee

"had been reliably informed that the minutes of ASCAP showed that they intended to increase our payments up to 25% of our gross receipts."

So far as I can discover, the sole basis for this assertion was a statement which had been made by Bennett at the Committee's meeting of May 13th; he told the Committee that the ASCAP minutes showed that one Sol Bernstein had made that proposal to ASCAP.

In his letter Hostetler had referred to the network contracts and stated that he did not see how it was now possible to avoid calling the Court's attention

"to this preference in explanation of the willingness of the chains to execute an extension agreement on the very eve of trial of the Government suit."

Levy replied

"Mr. Hostetler knows full well that reference to the chain contracts are without justification. He is fully acquainted with the situation and *knows* that ASCAP always intended to exact the highest possible tribute from all independents, irrespective of charges against the chains."

This last statement is also apparently based on a statement made by Bennett at the meeting of May 13th as to what he had seen in ASCAP minutes.

On June 11, 1935, trial of the Government's suit commenced. It was apparent from the outset that ASCAP was going to make capital out of the 5-year extensions. Its counsel referred repeatedly to them, and asserted that there could be no question of oppression or unreasonableness because several of the most important units in the industry had entered into extensions at even higher figures than before.

On June 17, 1935, Mills sent a letter to McCosker, advising that all license agreements would be extended to December 31, 1935, and offering (for the first time in writing) a 5-year extension from January 1, 1936.

A special meeting of the NAB Board was called for and held on June 22, 1935, at New York. The opposing parties were heard at length, including Levy, Klauber, Ashby and Hostetler. No useful purpose would be served by a detailed account of their contentions further than to note that emphasis was placed on an alleged lack of preparedness by the Government in its suit, as a reason of the networks seeking 5-year extensions. Also, for the first time, intense opposition to the per-piece plan by both Levy and the networks came out into the open. At the conclusion of the meeting, two resolutions were unanimously adopted by the Board. In one, it reiterated its support of the per-piece or measured service plan and absolved the networks and WCAU of anything improper in their negotiation of extensions. In the other, it upheld Loucks in sending Hostetler's letter to all NAB members.

At the Colorado Springs Convention held July 8-10, 1935, McCosker, Kay, Levy and Hostetler addressed the members at length. Again, no useful purpose would be served by even attempting to summarize their statements. At the conclusion, the Convention approved the resolution of the Board of June 22nd, declaring in favor of the per-piece or measured service plan and absolving WCAU and the networks. Other resolutions were adopted favoring continuation of the Government suit, instructing the NAB officers and directors to support it, and warmly commending Hostetler for his efforts and recommending that he be given an opportunity to continue giving the same service to NAB.

One excerpt from the Convention discussion is, I believe, of sufficient importance to deserve quotation. Church, KMBC, stated that as a network affiliate he had a contract with a network requiring him to have the necessary copyright arrangements. He asked Levy the direct question as to whether such stations now had any choice in the matter. The following colloquy ensued:

"ISAAC D. LEVY: In a legal manner or business manner?"

"MR. CHURCH: Both. In other words, has the action of the networks and yourself almost automatically bound us to the five-year contract with ASCAP?"

"ISAAC D. LEVY: Yes—but pleasantly so."

"MR. CHURCH: I am not questioning that. The point is: do we have a choice in the matter?"

"ISAAC D. LEVY: I don't believe you do."

By the end of July, some 55 stations had applied for and received 5-year extensions of their ASCAP licenses. The 55 included the 21 chain-owned or controlled units, WCAU and several of the newspaper-owned stations; very few of the independent stations not enjoying discriminatory advantages had sought extensions. Mills was promulgating the statement (as he has both before and since then) that ASCAP would still like to secure from the NAB a definite formula for the payment of copyright fees, which he said had never been forthcoming from the Association.

Before the end of the summer it became apparent that, in spite of the assurance given by Mills to McCosker on June 17th, stations other than the original 55 would not be given unqualified extensions of their contracts. Mills was now insisting on adding a rider protecting ASCAP against any obligation to maintain its catalog at substantially its size at the time and limiting the license to the empty right of cancellation of the license "in case there shall be a substantial diminution in the quantity of musical numbers." The rider obviously anticipated the withdrawal of the Warner Brothers group.

On September 23rd the NAB Executive Committee (Fitzpatrick, Levy and Baldwin) met with Mills informally to discuss provisions of the contract offered stations as well as the per-piece method of payment of royalties. In the meantime, it seems, ASCAP officials were privately advising stations to defer signing ASCAP contracts until that organization had put its own house in order, it being felt there was still some possibility that the Warner group would remain with ASCAP. An NAB Board meeting was called for October 17th.

At the Board meeting on October 17th in New York, there was discussion of the advisability of advising stations to seek 5-year extensions of their ASCAP contracts, and the Board instructed the Managing Director to do so. It also instructed him to prepare a report and recommendations dealing with the possible working out of a per-piece or measured service plan. By November 15th, only about 80 stations had signed ASCAP renewals and Mills was quoted as saying that full opportunity would be given all stations to negotiate "new contracts" in the

event of withdrawal by the Warner group. He asserted that the basis for negotiations naturally could not be foretold.

For reasons later explained to the Board, I did not send the letter. On December 3rd, Levy, calling from Klauber's office, insisted that such a message be sent. After consultation with Fitzpatrick, NAB President, I polled the NAB Board and, as a result of a vote of 10 to 9, I sent a telegram instructing them to accept 5-year extensions. Two of the directors thereupon changed their votes, with the result that the vote was 11 to 8 against sending the telegram. Thereupon, I sent a second telegram notifying members not to ask for extensions. In the meantime, a small number of stations had sought and secured extensions so that the total of those who, in addition to the original 55, had such extensions (but with the rider as to repertoire) was slightly over 70.

An NAB Board meeting was called and held in New York on December 9th, 10th, 16th and 17th. The results of this meeting are best treated under the next heading.

IV. THE RECENT FAILURE IN ASCAP NEGOTIATIONS

On December 17, 1935, the last day of its meeting held in that month in New York, the NAB Board of Directors designated its Managing Director to act in the emergency created by the approaching copyright crisis created by the expiration of ASCAP licenses on December 31, 1935 and the withdrawal of the Warner Brothers group from ASCAP effective after that date. He was given authority to act for such stations as desired to have him do so, and stations were urged to send him powers of attorney enabling him to negotiate in their behalf. He was also given authority to name and assemble an Advisory Committee to confer and advise with him in New York.

Pursuant to the Board's action over 300 broadcasters executed and sent in powers of attorney. This number included a large proportion of the important independent stations in the country and far exceeded the response which had been hoped for.

Further pursuant to the Board's action, I selected an Advisory Committee, consisting of Messrs. Allen, Caldwell, Carpenter, Church, Clark, Craig, Cowles, Damm, Fitzer, Gough, Loucks and Myers, and on December 24, 1935, sent each of them a wire as follows:

"Will greatly appreciate your advice and counsel during further negotiations on copyright beginning Friday, December 27, St. Regis Hotel Stop I make this request because I believe you are free and willing to exercise your best judgment for industry as whole Stop If I have erred in judgment and circumstances are such that you must be guided by your personal interests or the interests of any group then I expect you to decline invitation Stop Am sure you can appreciate importance of premise upon which invitation is extended Stop Similar invitation extended to (here follows list of names other than the party to whom addressed) Please advise will be in Washington until Wednesday evening."

Of those invited, Messrs. Allen, Caldwell, Carpenter, Clark, Damm, Fitzer and Loucks were able to accept and to be present. Mr. Craig accepted but was unable to be present at the first session.

The Advisory Committee met with me at the St. Regis Hotel, New York, on the morning of Friday, December 27th, and were in continuous session until Tuesday, December 31st. Due to the appearance of the first Warner contract Friday morning, and the necessity for attempting to secure a revision of it, the committee had to subdivide its labors, and a subcommittee consisting of Messrs. Caldwell, Damm and Loucks devoted themselves principally to the Warner negotiations, described under the next heading.

Mills, ASCAP's general manager, left New York just prior to the day on which the Advisory Committee assembled, and remained out of town until Tuesday, December 31st. Buck, president of ASCAP, was out of town from Friday until Monday. This left only Burkan, the ASCAP General Counsel, with whom to negotiate.

On Friday, I had arranged a meeting with Burkan for late in the afternoon. The meeting was delayed by Burkan from hour to hour and finally I was told that he could not see me that day. This, I learned, was because of conferences he was having with network representatives. During the day, the network companies secured from Burkan a letter as follows:

"Confirming our conversation today, this is to inform you that from and after January 1, 1936, you may continue to broadcast and to publicly perform for profit the compositions in the repertory of the American Society of Composers, Authors & Publishers as of January 1, 1936, under your network system without any interruption on and after January 1, 1936, until further notice from the American Society of Composers, Authors and Publishers, such notice to be not less than two-day period. It is understood, of course, that we are not relieving these affiliates of the obligation to pay us performing fees in accordance with existing contracts."

They immediately advised their affiliates of this arrangement by telegraph.

On Saturday morning, December 28th, I succeeded in seeing Burkan. In the course of the discussion, I was clearly given to understand that ASCAP would be willing to grant temporary extensions of the same sort as those accorded to network affiliates on network programs with the understanding that a joint committee representing all interested elements would meet shortly after January 1st to arrive at a definite and permanent solution. I was also given to understand that ASCAP might be willing to accord an extension for a definite period, e. g., 6 months, to broadcasters who had not accepted five-year renewals. With this understanding I returned to discuss such an extension with the Advisory Committee, and, with their approval, sent the stations a telegram as follows:

"Am assured by ASCAP general counsel that temporary extensions of ASCAP licenses will be granted by letter to me at present rates and without signing contracts,

stations and ASCAP each to have right to cancel on two days' notice with understanding joint committee all interested elements meeting shortly after January 1 to arrive definite permanent solution. On Monday expect to ask and obtain six-month extension on this basis. Advise whether I may use if necessary your power attorney on this basis with ASCAP. Negotiations with Warner proceeding today. Langlois & Wentworth, New York City, can furnish 60 fifteen-minute programs public domain music. Transcontinental Broadcasting Company, Los Angeles, can furnish 200 musical selections which can be performed without copyright license cost 60 cents per selection. Both copyright libraries should offer opportunity to avoid Warner music pending adjustment their proposed contract."

Nothing further occurred, so far as ASCAP is concerned, until Monday morning. At that time I conferred with Buck and Burkan. They refused to grant a 6-months or any other definite extension and I was able to secure only an indefinite extension represented by the following letter, signed by Buck, President of ASCAP:

"This is to inform you that such of your member stations and such stations, in respect to which your Mr. James W. Baldwin holds power of attorney to act for them, as do not have licenses from the American Society of Composers, Authors & Publishers (for brevity called "Society"), from and after January 1, 1936, may continue to broadcast and to publicly perform for profit the compositions in the repertory of the Society, as of January 1, 1936, without any interruption on and after January 1, 1936, until further notice from the Society, such notice to be not less than two (2) days.

"It is understood, of course, that we are not releasing these stations (those which are members of your Association and those which are represented by Mr. Baldwin by virtue of powers of attorney) of the obligation to pay the Society performing fees in accordance with the existing contracts."

I accepted this extension in writing.

On the same day, December 30th, ASCAP sent out a wire to all stations which had not already secured 5-year renewals, as follows:

"This is to notify you that the American Society of Composers, Authors & Publishers is prepared to extend your present license agreement with it upon the same terms and conditions for five additional years from January 1, 1936, except that the rights granted by the Society shall be limited to compositions of the membership as constituted on January 1, 1936. The Society challenges the claims made by others to ownership in the small performing rights of various compositions published by them but written and composed by members of the Society. The Society controls the performing rights of many of such compositions and within a very short time will publish a list thereof. As our examination of individual contracts progresses we are confident that our repertory will be increased in respect of many compositions the performing rights of which are exclusively claimed by others. To illustrate published reports that the Society can no longer license small performing rights in the works of George M. Cohan, Victor Herbert and some others are absolutely without foundation. The Society

has the right to grant licenses in respect of these works and will protect all its licensees broadcasting the same. While we of course have no objection to your taking any other licenses which you may desire to take we feel it only fair to tell you that your fee to the Society will not be reduced and the formula will not be altered except that the license will be limited to works in Society's repertory as of January 1, 1936, and furthermore to advise that with respect to any composition the licensing rights of which are exclusively vested in us we will not recognize any license which you may obtain from others."

I immediately sent out wires to all stations advising them of the temporary extension accorded by Buck's letter and advising them not to accept the 5-year extensions offered in the above-quoted telegram. It is my understanding that approximately 400 stations followed this advice and refrained from taking the 5-year extensions.

We immediately turned to the task of preparing the way for the joint discussions with ASCAP which Burkan had given me to understand would now take place. Since one of the oft-reiterated complaints of ASCAP had been the lack of definite proposals by NAB which could be used as a basis for discussion, I set to work to prepare a statement of principles which should guide our negotiations and state our objectives, in a manner suitable for serving both as a basis for discussion and as a proper way to advise the NAB membership of our activities. With the completion of a draft statement, I called the Advisory Committee to meet with me again in New York on January 10th, to discuss it with me and, after putting it in final form, to take it up with ASCAP. Both ASCAP and the networks knew that this meeting was being held.

On Friday, January 10th, we spent the entire day in putting the statement into final form and by evening it was completed. At a late hour, approaching midnight, I was called by a third party and was told for the first time that during the evening the following wire had been sent by ASCAP to about 400 stations:

"On December 30, 1935, the ASCAP offered to extend your present license agreement upon the same terms and conditions for five additional years from January 1, 1936, except that the rights granted by the Society to you shall be limited to compositions of the membership as constituted on January 1, 1936. To this wire the Society has received no answer and unless we hear from you by January 15 that you accept such offer the Society will deem you to be an infringer in respect of the performances and broadcasting of any of its works and you shall be held to strict accountability on account of all performances of its works beginning January 1, 1936."

I immediately made every effort to get in touch with the ASCAP officials, without success. I also immediately telephoned Ashby and Klauber and found that both knew of the telegram. Both of them vigorously defended ASCAP's action. Several days later, an ASCAP official informed a member of the NAB Board of Directors that the telegram had been sent at the insistence of the two networks. If this be true it means, of course, that over 300 independent broadcasting stations in this country

were deprived of their liberty of contract and of their last opportunity to negotiate by joint action of the networks and ASCAP.

The following day, Saturday, January 11, every effort was made, both directly with ASCAP and by contact with the networks, to secure a reconsideration of ASCAP's action. During the day I sent a wire to stations as follows:

"Am advised ASCAP last night wired all stations that unless they communicate acceptance of five-year offer by January 15 they will be deemed infringers. This in effect appears to be cancellation of temporary arrangement based on Buck's letter of December 30. Consequently, if you need ASCAP music suggest you wire acceptance to ASCAP on January 15 but not before in order that give me benefit of such last-minute desperate efforts as I can make."

For a while there seemed a faint hope that I might be permitted to appear at an ASCAP Board meeting to be held Tuesday, January 14th, and to argue in favor of a withdrawal of the ultimatum. The statement which had been agreed upon with the Advisory Committee on the preceding Friday was printed and circulated to the members on January 13th as an NAB Bulletin with the title "Tentative Program of Activity in Behalf of the NAB." Copies were immediately sent to ASCAP and the two networks. All efforts, however, were unavailing and on January 14, I sent the following telegram to all stations who had given me powers of attorney:

"ASCAP has refused request for stay of their action taken tenth Stop This leaves no alternative for stations that must use ASCAP music but to accept offer contained Buck's telegram December 30 Stop Have not used your power of attorney to bind you in any way Stop Because some stations for which I hold power attorney have already accepted ASCAP offer per my wire eleventh and others have indicated they may not accept suggest it is best under all circumstances and my future plans toward reformation of contracts that you clear matter yourself by addressing telegram to ASCAP not later than fifteenth stating you accept Buck's offer thirtieth."

On January 15th the ASCAP ultimatum went into effect and by the close of that day practically all broadcasting stations had been forced to wire ASCAP for extensions of their 5-year contracts.

V. NEGOTIATIONS WITH THE WARNER BROTHERS GROUP OF MUSIC PUBLISHERS

By May 15, 1935, it became generally known that the Warner Brothers group of music publishing houses (Harms, Inc., T. B. Harms, Witmark, Remick and New World) had stated that they were planning not to renew their memberships in ASCAP, which memberships expired December 31, 1935, and that thereafter they would deal in their own right with broadcasters and other groups of music-users. How long before May 15th they had evidenced such an intention within a limited circle, I do not know. In addition, several other important houses (said

to include Feist, Mills, Marks, Fisher, Schirmer, Berlin and Robbins) were reported as indicating that they might follow the lead of the Warner Brothers group.

The Warner Brothers group controls a very large percentage of all music broadcast. They claim it is 40% of ASCAP music. The fact seems to be, however, that, in the case of the networks and the larger stations at least, the percentage was not more than about 20% of ASCAP music, while, in the case of smaller stations and particularly stations making a heavy use of phonograph records, the percentage is considerably higher. The other important houses who were considering withdrawal controlled, it is said, an additional 40% of ASCAP music. There was also a rumor that the Austrian and German societies might withdraw from ASCAP and follow the lead of SESAC as new and separate licensing pools.

Until about June 2, 1935, at least one of the networks had been negotiating for the purchase of the Warner Brothers group and perhaps others of the houses. On that date negotiations were broken off.

On June 24, 1935, the Warner Brothers group made public announcement of their withdrawal from ASCAP, effective December 31, 1935, and, in a letter to all stations, notified broadcasters that after that date all licenses for performing rights of their compositions must be obtained from them and that any infringement would be prosecuted.

Passing over relatively unimportant developments, we find that on November 26, 1935, the Warner Brothers group put all doubts at rest by issuing a public statement in which their resignation from ASCAP was announced and explained, principally on the ground of "insufficient and inadequate royalties collected by the society from radio broadcasters." It organized a corporation, known as Music Publishers Holding Corporation (MPHC) through which it proposed to issue licenses.

Prior to the morning of December 27, 1935, the Warner Brothers group had not, however, offered or submitted any definite proposal or formal contract to the NAB or, so far as we know, to broadcasters generally. There had been informal discussions earlier in December, but without result. It was known, however, that

(a) the Warner Brothers group was dissatisfied with the amount it has been receiving from ASCAP (\$340,000, which when combined with the like amount paid to the group's composers, made a total of \$680,000 out of a total of slightly under \$3,000,000 paid by broadcasters to ASCAP during 1935);

(b) that it was demanding a total of not less than \$2,000,000 (\$1,000,000 to the publishers and \$1,000,000 to the composers) or approximately three times as much as in the past;

(c) that it proposed to obtain this amount by (1) charging sustaining fees equal to 40% of those charged by ASCAP; (2) charging 2% of net receipts of the broadcasters, and (3) applying the 2% percentage to what it considered a hitherto untapped source of revenue, i. e., the revenue of networks as network (as distinguished from the network-owned or -controlled stations).

In the course of the NAB Board meeting December 9th to 17th, no action was taken with regard to the Warner Brothers group. The matter was one which was covered by the authority vested in me as Managing Director, by action taken by the Board December 17th, described under the preceding heading.

In the course of Friday morning, December 27th, a definite formal contract was presented by the Warner Brothers group for the first time.

The contract was immediately read over to the Advisory Committee. It was obvious from a single reading that its terms were not only exorbitant and objectionable, but, in certain respects, impossible to comply with. With the approval of the Advisory Committee, I wired the stations as follows:

"Am informed Warner Brothers contract mailed to all stations today stop Together with committee and attorneys have examined it and believe terms wholly unacceptable stop Am endeavoring negotiate modification of contract but there is chance negotiation will prove unsuccessful and that you should be prepared to face alternative of signing this contract or doing without Warner music January first stop Negotiations continuing on ASCAP contract stop Will keep you informed."

In the meantime a sub-committee was designated to study the contract and draw up a memorandum analyzing it and pointing out its objectionable features. This memorandum was completed in the course of the afternoon, and was mimeographed and mailed to stations with a covering letter signed by me as follows:

"Herewith enclosed is an analysis of proposed Warner Brothers contract. It has been prepared hurriedly. Some of the criticisms are of minor importance but on the whole it will be observed that the terms and conditions of the contract are entirely too severe. Conversations had this evening indicate that there is a possibility of meeting a few but not all the objections raised. The conversations will be pursued tomorrow."

The memorandum was used as the basis for conversations held that Friday evening with Mr. Herman Starr, executive in charge of the Warner Brothers group, and as the basis for negotiations conducted Saturday and Sunday with Mr. Starr and Mr. A. M. Wattenburg, general counsel for the group.

It is unnecessary to repeat what was set forth in that memorandum. It will be sufficient if attention is called simply to the amount and the basis for calculating compensation that would have been required under its terms. It would have required each licensee to pay 40% of the sustaining fee paid ASCAP and 2% of the licensee's net receipts (the term "net receipts" to include not merely the actual net receipts of the licensee but also, in the case of a network affiliate, the receipts of the network for the affiliate's facilities).

Starr appeared before us at about 8:00 p. m. Friday evening. The conference lasted until about midnight. He was adamant in refusing to modify his position with reference to the principal objections. He stated that the Warner Brothers group would not depart from its funda-

mental premise that the Warner Brothers group was entitled to a total of \$2,000,000 yearly for use of its music by broadcasters and evidenced no inclination to depart from the means, methods and percentages specified in the contract.

With reference to some of the minor objections, Starr was impressed with the arguments presented by us. He explained that he was not familiar with the practical side of broadcasting and that he was perfectly willing, with his attorney, to sit down with our group and attempt to improve mistakes that might have been made in the contract due to his lack of knowledge of the effect of its provisions on practical operations. This left, of course, only a very slender thread on which to pursue negotiations. We felt, however, that it was better to pursue this narrow thread for what it was worth than to abandon all hope of improving the terms of the first contract.

At this point, certain premises and assumptions on which we were in agreement should be set forth. They were as follows:

1. It would not be proper for the NAB, or for me as its Managing Director, to advise members of the NAB not to sign any contract with the Warner Brothers group or to dispense with Warner Brothers music, both for reasons hereinafter stated and because, taken in conjunction with the actions of the network and of ASCAP, such a procedure ran the risk of being held to be an illegal boycott.


2. A considerable number of broadcasters needed or wanted to use Warner Brothers music after December 31, 1935, and, if no other alternative were presented, many of them would sign the contract on the 40%-2% basis.

3. An even greater number of broadcasters, whether or not they needed or wanted to use Warner Brothers music, would be unable to avoid infringements and liability therefor at the rate of a minimum of \$250 per infringement. Their inability would proceed from insufficient facilities, records and staffs, from lack of any lists from either ASCAP or Warner, from the difficulty of controlling music played by remote control orchestras, etc.

4. For want of information and lack of opportunity for obtaining it, we were in no position to form any opinion on the merits of the issues in dispute between ASCAP and the Warner Brothers group as to control over the performing rights on a number of musical compositions. The course taken by the two national network companies, who had had much greater opportunity to look into the matter, was some indication that it would be extremely hazardous to broadcast any Warner music without a license from the Warner Brothers group.

During Saturday a sub-committee conferred with A. M. Wattenburg, general counsel for the Warner group, and later in the afternoon, with Wattenburg and Starr. Its starting point consisted merely in certain concessions which, as already stated, Starr had shown himself willing to make the evening before, having to do principally with requirements as to records and reports. The sub-committee, however, succeeded in re-opening the entire subject and by the end of the afternoon had made substantial progress. Among other things, Starr and Wattenburg began to appreciate more fully the justice of the broadcast-

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ers' claims that compensation should be based not on revenue but temporarily on card rates and eventually on a *per-piece* system; that broadcasters have a right to trustworthy lists of compositions controlled by the licensor; and that copyright should be cleared at the source, particularly in connection with network programs and electrical transcriptions. While no agreement was reached at this session, sufficient progress was made so that the sub-committee agreed to make calculations showing what revenue might be expected by Warner if compensation were based on card rates. The sub-committee returned to the hotel and made these calculations from the December issue of *Radio Advertising*, reducing their calculations to itemized statements showing the highest quarter-hour and the highest half-hour rates for each station in the United States; the deductions that would have to be made on a proportional basis for stations having less than full time; and the number of stations whose quarter-hour rate was \$18.00 or less. It proved impossible to use an hourly rate as a basis of calculations as so many stations do not publish such rates, and in fact the same was partially true of the one-half-hour rate. The sum total of the highest quarter-hour rates of all stations, thus calculated, came to slightly over \$23,000.

Up to this point, Warner had not receded from its demand that the total costs be \$2,000,000 annually from broadcasters. Obviously, to reach this amount it would be necessary for each station to pay a monthly compensation of approximately seven times its highest quarter-hour rate. This seemed impossible on its face and was very disheartening. The sub-committee, however, reported back to the full committee and in spite of the apparent obstacles it was agreed that the group was to continue the negotiations for the sake of whatever advantages might be secured.

Negotiations, therefore, were resumed early on the following day (Sunday, December 29). They were accompanied by discussions of all the other points raised and, in particular, discussion of the *per-piece* plan. Members of the full committee participated from time to time. Finally, by late in the afternoon, Starr agreed to reduce the basis for compensation for independently-owned stations from seven times the highest quarter-hour rate to four times the highest quarter-hour rate, the license to cover only non-network programs. It was apparent to all present that no further concession in total amount of compensation would be made. It was also apparent that, for lack of information on both sides, it would be impossible to put into effect immediately a *per-piece* plan although considerable consideration was given to working out a *per-piece* plan which would be based on the highest quarter-hour rate (that is, a certain percentage such as $\frac{1}{2}$ of 1% of such rates for each piece broadcast). Because of this lack of information and because of the fact that the contract might serve as a precedent, Warner felt it would have to fix a fee *per-piece* that would be high enough to protect it in the future while the committee felt, for somewhat the same reasons, it must in-

sist on a fee sufficiently low to meet all situations. Both sides recognized that the matter needed further study. The result was that Warner chose the flat fee basis for its revised contract for a temporary period of three months, the flat fee being based on four times the highest quarter-hour rate and covering all non-network programs, and agreed to cooperate in working out a *per-piece* plan in that period.

By late Sunday afternoon when the committee was convinced that Warner would make no further concessions, Wattenburg proceeded with drafting the revised contract in the presence of the committee. During the course of revision a number of further points arose, some important and some not, but all of them entailing a certain amount of delay and discussion. It was not until well after midnight that the draft was completed and even then one or two points were left open in cases where the parties did not differ in principle but had not succeeded in finding the precise language which would be appropriate. These were settled early the following morning. Somewhere between 2 a. m. and 3 a. m., Monday morning, after conferring with members of the committee, I sent out the following telegram:

"Disregard Warner contract sent you this last week. Warner Brothers now offering revised three months' contract which will remedy many of objections pointed out by us and which in opinion of committee and myself will be substantially more favorable. Basis for compensation for full time station for all non-network programs is to be monthly payment of four times your highest quarter-hour rate. Other stations proportionally. Stations where highest quarter-hour rate less than \$18 basis of compensation not to exceed twice highest quarter-hour rate. Networks to have responsibility for clearing copyright on all network programs over their own stations, and over affiliate stations. Warner agrees to attempt to work out *per-piece* plan during contract period and to furnish complete catalogue by Feb. 1. Several other improvements in contract agreed to by Warner. Printed revised contract cannot be delivered to you for a day or two. If you desire to use Warner music after December 31 Warner assures me you can gain rights given by this contract by instructing me to accept in your behalf. Please wire immediately."

During Monday, December 30th, the revised contract was printed and by that evening it was on its way to most of the stations.

Space will not permit a detailed comparison of the provisions of the revised contract with those of the first contract. It will be helpful, however, to point out what progress was made with respect to the principal objections.

(a) *The amount of compensation.* Instead of asking for a total of \$2,000,000, the revised contract is based on asking a theoretical total of \$1,104,000 from all stations (including those owned and operated by the networks), for non-network programs. This sum represents 48 times the total of the highest quarter-hour rates of all stations. It must, however, be reduced by the amount of the concessions made by Warner to small stations and to stations

having various kinds of time limitations. For example, stations having quarter-hour rates less than \$18.00 were to pay only twice the highest quarter-hour rate monthly; since then Warner has made further concessions and raised the dividing line to \$25.00. Also since the network companies have not accepted Warner's contract, the total must be reduced by another very substantial sum, possibly in the neighborhood of 20%, assuming that all independently-owned stations accept the contract.

(b) *Method of calculating compensation.* As already noted, for the temporary period covered by the contract, the basis is a flat rate based on the highest quarter-hour rate. The contract recites the intention of the licensor to attempt to work out a *per-piece* plan. The principle of payment of copyright fees at the source is given complete recognition with respect to network programs and to some extent with reference to electrical transcriptions. Finally, very significant progress was achieved in the provision requiring Warner to furnish a complete list of its compositions not later than February 1, 1936.

(c) *The agreement to indemnify.* Only partial success was had under this heading. Warner did not agree to remove the limitation on the amount of guarantee, claiming that for a station having both ASCAP and Warner licenses no greater protection is necessary; its reason for this conclusion is that the only serious issue likely to arise on its music is ASCAP's claim to have the right to license performing rights on some of it and therefore the only thing likely to affect any station is that money paid to Warner should have been paid to ASCAP. Considerable progress was made through the inclusion of the item already mentioned; i.e., the furnishing of lists by February 1, 1936. In Starr's statement made public late in the afternoon of December 30th, the agreement of indemnity is given an entirely satisfactory construction in the following language:

"3. For the first time radio stations will be furnished with a complete catalogue of the compositions of which we warrant ourselves to be the owners."

(d) *Records and reports.* Under this heading the revised contract still calls for weekly reports of all compositions including those not controlled by licensor. This feature is objectionable. On the other hand, the requirements were considerably lightened with respect to reporting on compositions contained in network programs, electrical transcriptions, and phonograph records, so as to make compliance at least possible if not to relieve the burden.

Other improvements will be noted at several points in the revised contract in line with some of the suggestions made in the committee's memorandum drawn up on Friday, December 27th.

During Monday, December 30th, a large number of replies were received from stations to the telegram above quoted sent out early that morning. The same was true of days which followed. Many of the stations communicated by telephone. Without attempting to tabulate the results by days, it may be said that by the morning of January 1, 1936, the totals indicated that 154 stations were accepting the contract, 67 more were doing so tentatively, and 64 (in addition to the networks) had indi-

cated that they were not accepting the contracts. Most recent reports indicate that considerably over 200 stations have taken the contract.

In letters sent to their clients and agencies on December 24th, the two networks notified them that, effective December 31st, and until further notice, no music controlled by the Warner Brothers group would be performed. These letters set forth at length their reasons. They will be found reprinted in full in *Broadcasting*, January 1, 1936 (Vol. 10, No. 1), at page 7.

The developments beginning with Monday, December 30th, were complicated by telegrams sent by Gene Buck, President of ASCAP, to stations which had not yet agreed to a five-year extension, by the National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc., to all (or most) of their affiliated stations respectively; and by Leo J. Fitzpatrick, President of the NAB, to all member stations.

A copy of Buck's wire has been set forth under the preceding heading. The NBC wire was substantially as follows:

"We have had a number of telegraphic and telephone inquiries today asking our position in regard to a telegram received this morning by many associated stations from Mr. Baldwin regarding negotiations he has apparently had with Warner Brothers. Baldwin did not send us a copy of his message nor has he consulted us about it nor has the National Broadcasting Company agreed to any of the terms therein. National Broadcasting Company's position continues to be the same as outlined in Kobak's letter of December Twenty-third sent you by Brophy and accordingly National Broadcasting Company does not intend to schedule Warner publications on and after January First and will not agree to the terms outlined in Baldwin's telegram. We will continue with ASCAP catalogue on and after January First in accordance with my wire to you dated December Twenty-seventh quoting Mr. Burkan's letter."

The CBS wire was substantially as follows:

"For your information CBS is in no wise a party to the contract we understand is being offered to stations by Warner publishers group nor does any CBS owned station intend to take this contract stop On contrary we intend to abide by our decision to rely on ASCAP license but to play no Warner Brothers music until confused legal status is clarified stop Signing of Warner Brothers contract will not relieve you of obligation to pay copyright fees on local and network programs broadcast by you stop Printed list of Warner numbers mailed you today represents best information on what Warners claim to control but we are informed by ASCAP counsels that many compositions in list can be licensed only through ASCAP."

Mr. Fitzpatrick's wire was substantially as follows:

"In answer to numerous telegrams I feel I should clarify my position in the present copyright controversy stop As Vice-President of WJR Detroit and WGAR Cleveland I am not entirely in accord with the course pursued by the Managing Director of NAB stop In July of this year I renewed my present contract with ASCAP for period of five years and do not intend dividing the

industry by signing any other contracts stop I do not want this telegram to be construed as advising members as to what course to pursue but as one of the owners of two stations. I urge a united front."

Since January 1, 1936, the Warner Brothers group have instituted a large number of suits for infringement against the two networks (or their subsidiaries) and against a few independent stations not having Warner contracts. I am advised that in the case of the networks ASCAP is undertaking the defense of these cases; I do not know whether it intends to do the same for independent stations.

VI. THE NAB THREE-POINT PROGRAM

Resolutions adopted at the St. Louis Convention in November, 1932, laid the basis for a three-point program of activity in the field of copyright. This program was formally adopted at an NAB Board meeting held April 5, 1933, as follows:

1. Immediate incorporation and establishment of the Radio Program Foundation.
2. Immediate steps toward litigation against ASCAP under the anti-trust laws.
3. The securing of remedial legislation to check ASCAP's activity.

A brief account of the progress made on each point of this program is helpful both because of the light it throws on the course of the negotiations and because of the assistance it may afford in determining NAB's future course of action.

Radio Program Foundation. In a general way, the idea of making public domain music available had been considered at meetings of the NAB Board and by the so-called Plenary Committee in the spring and summer of 1932. At the St. Louis Convention in November, 1932, Schuette strongly advocated the creation of an industry-owned radio music supply through a new corporation which would become a subsidiary of NAB, to rid the industry of its dependence upon ASCAP. He offered a resolution providing that a Radio Program Foundation, with a capitalization of about \$150,000, be subscribed by the industry. His resolution was referred to the NAB Board for consideration.

In a bulletin sent out to all stations on December 31, 1932, Schuette took an initial step to test out the plan. Two compositions published by a non-member of ASCAP were sent out to all stations for performance. Further steps of the same sort were taken at later dates, but none of them was attended by any great amount of success, primarily because of the quality of the music.

At the NAB Board meeting held in Washington, February 20-21, 1933, the proposal for a Radio Program Foundation was adopted, and a special committee was designated to carry forward the project. On February 23rd, Schuette sent out a bulletin describing the purposes of the Foundation.

On April 5th after negotiations with ASCAP were again broken off, it was decided to proceed immediately with the establishment. It was incorporated as a Delaware

corporation in the second week in April with Messrs. McCosker, Loucks, Hostetler, Schuette, and Flamm as its incorporators, and with Schuette as its operating head. Among others, its objectives were to establish relations with independent copyright owners and publishers and at once set up an organization competitive with ASCAP, to open up negotiations with certain other copyright pools probably along with certain foreign associations, and to explore public domain music.

Organization of the Radio Program Foundation was completed at a meeting of its Board of Trustees in New York, May 3, 1933. McCosker was elected chairman of the Board, Schuette president, Hostetler, secretary, and Loucks, treasurer. Schuette immediately began conferences with owners and their representatives owning titles not included in the ASCAP pool. Headquarters were opened in Washington.

On June 14, 1933, the Foundation secured the American radio rights to the catalogue of G. Ricordi & Co., of Milan, Italy, containing more than 123,000 numbers in all branches of music, including the hitherto restricted Puccini catalogue. Ricordi had, several years before, withdrawn its affiliation with ASCAP because of meager royalties. The Foundation offered the catalog to NAB members at monthly royalties ranging from \$2.50 to \$25.00, with higher fees for non-members. On network programs, the principle of clearing copyright at the source was given full recognition in these licenses. Licenses were offered to NBC and CBS and, if they were consummated, the Foundation was to pay additional sums to Ricordi, which arranged the transaction on a sliding scale providing for increased charges for network participation as well as for stations outside the NAB. After considerable delay, both networks took licenses. The amount of the license was calculated on a non-profit basis to the Foundation and NAB. It is true, of course, that a large portion of the Ricordi catalog was not protected by copyright in the United States, but it was also true that much of the catalog had already been recorded and had the advantage of being immediately available.

Shortly afterwards Schuette sent to all NAB members a compilation of records that are in the public domain.

At the Annual Convention held in Cincinnati September 16-18, 1934, a resolution offered by Schuette was adopted directing the NAB Board

"to organize a music pool, either by a reorganization of the Radio Program Foundation or otherwise for the purpose of obtaining for radio broadcasting stations the air rights to such music as may not otherwise be available or which may be made more readily available by such a pool, and to enlist the cooperation of all radio stations and their program departments in promoting the widest possible use of such music."

Unfortunately, the Foundation met with apathy on the part of the NAB Board, the networks, and the broadcasters generally. It was never adequately staffed with trained and experienced personnel. During 1934 and 1935 it was virtually dormant. By arrangement between Schuette and Ricordi, stations were permitted to renew

licenses directly with Ricordi. Finally, as of December 31, 1935, the corporation was formally dissolved.

Anti-Trust Proceedings Against ASCAP. Proceedings against ASCAP under the anti-trust laws were vigorously urged by Levy, WCAU, at the St. Louis Convention in November, 1932, in a plea based on his own experience.

With the breaking off of negotiations again with ASCAP on April 4, 1933, the institution of litigation became an active part of the NAB program.

On September 1, 1933, a test suit was filed against ASCAP in the Federal District Court for the Southern District of New York, in the name of Pennsylvania Broadcasting Company operating WIP, Philadelphia. The suit sought dissolution of ASCAP as an illegal combination in violation of the anti-trust laws, and asked that WIP's contract with ASCAP be declared void.

The WIP suit never came to trial, although it is at issue. With the filing of the Government suit against ASCAP, however, it was felt that every effort should be concentrated on assistance to the Government rather than on the private suit.

On August 30, 1934, in the same Federal District Court, the United States Government instituted suit under the Sherman anti-trust law asking dissolution of ASCAP, the Music Publishers Protective Association (which in March, 1933, had demanded a new rate of 25c per number of electrical transcriptions, instead of 2c per record), and the Music Dealers Service, Inc., naming approximately 125 officers and directors of the organizations, including Buck, Mills, Burkan and Paine.

By this suit the Government sought to establish a system of fees based upon the actual use made of public performance rights and to substitute competition among copyright owners for the monopolistic control exercised by ASCAP. It prayed that existing contracts of ASCAP with broadcasters and other users be declared invalid, as well as contracts between ASCAP and MPPA, and authors, composers and publishers. The suit asked that the defendants be restrained from entering into similar contracts; from joining similar firm, corporation, or society unless the facilities of such firm, association, corporation or society are open to every copyright owner on equal terms and unless license fees to be collected pursuant to licenses are determined by individual copyright owners for each musical composition owned by them; and from instituting infringement suits against any licensee upon the giving of bond by such licensee to insure payment of a reasonable charge as the court may determine or as may be arrived at between licensee and individual copyright owners. The Government's petition called attention to the

"distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 per cent by newspapers, and license agreements exacted from radio broadcasting stations not so owned"

and verbatim copies of the two types of license agreements were appended as exhibits.

The suit was filed just as the existing ASCAP license agreements with broadcasters were entering upon the

third year of their life, and the percentage on receipts to be paid by broadcasters was increased from 4% to 5%. While naturally the suit was more than welcome, and a great hope was aroused by its institution, it was obvious that only a miracle could bring about a successful termination of the suit in the lower court alone by September 1, 1935, when the contracts expired.

At the Annual Convention held in Cincinnati September 16-18, 1934, the NAB adopted a resolution instructing its officers and directors to support the Government suit.

An answer by the great majority of the defendants (83) was filed November 1st. It was a voluminous document of 42 pages and for the most part was a repetition of the story so often told by ASCAP at Congressional hearings, with which broadcasters are already familiar. The answer declared that a system of royalties based on actual use would be unworkable, and that broadcasters and other users were really seeking a situation under which they would pay nothing for copyrighted music. It alleged dire consequences if ASCAP were dissolved. It attempted to justify the favorable newspaper station contracts.

In the Government suit, a motion was made by the Government that a great deal of irrelevant matter be stricken from the defendant's answer. ASCAP moved that a commission be appointed by the Court to take testimony both in this country and abroad. The Court heard arguments on the motions January 11, 1935.

On March 26th, Federal Judge Knox granted the Government's motion to strip the case of irrelevant matter and denied ASCAP's motion which sought to delay the case by taking depositions all over the world. He left the way open, however, for ASCAP to reapply to take testimony on 3 or 4 relatively minor points, but only if exceptional reasons should be advanced. The Court's ruling was tantamount to a holding that the case was henceforth limited to the important issue of illegal price-fixing by ASCAP, and the way was open for expediting trial of the case.

On May 7th Andrew W. Bennett, special assistant to the Attorney General in charge of the Government suit, appeared before Judge Knox on a motion previously filed that the Court fix a definite early date for trial. He called the Court's attention to the widespread apprehension in the broadcast industry and elsewhere as to the demands that might be made by ASCAP at the expiration of existing contracts on September 1, 1935. Shortly afterwards the case was set down for trial June 10th and the Department of Justice proceeded to prepare for trial.

A further attempt by ASCAP to delay the case by a motion for postponement until fall was denied. On June 11th the case got under way before Federal Judge Goddard.

A half-dozen witnesses were heard in behalf of the Government and were subjected to lengthy cross-examination by Burkan, ASCAP counsel. On several occasions Burkan referred to the 5-year extensions secured by WCAU and the networks and asserted that there was no question of oppression or reasonableness in the charges

for music involved because several of the most important units of the industry had entered into 5-year extensions at a figure even higher than before. After less than two weeks, when it became obvious that the case could not be completed by July 1st, the Court adjourned the case until November 4th.

At the NAB Convention held at Colorado Springs, July 8-10, 1935, resolutions were adopted favoring and approving a continuation of the activities of the Attorney General and his staff in the Government suit against ASCAP, and instructing the officers and directors of the NAB to support the suit.

"to the end that royalties for the public performance of music may be determined by free and open competition among copyright owners."

On October 17, 1935, Government counsel conferred with ASCAP counsel and with the Court, and as a result the date of trial was again deferred from November 4, 1935, to January 6, 1936. This postponement was due primarily to delay on the part of counsel in agreeing on a stipulation of facts which the Court had asked them to prepare.

As a result of the public announcement of the withdrawal of the Warner Brothers group on November 26, 1935, trial was not resumed on January 6, 1936.

Legislation. Prior to September 1, 1932, there had, of course, been a great deal of important legislative activity which cannot be summarized here and which, in any event, did not result in any changes in the Copyright Act of 1909.

With the breaking off of negotiations again with ASCAP on April 4, 1933, remedial legislation again became an active part of the NAB program.

At the Annual NAB Convention held in Cincinnati September 16-18, 1934, a resolution was adopted petitioning Congress to amend the copyright law by omitting the language which fixes the minimum infringement penalty at \$250 and attorney's fees, leaving the court free, in each instance, to fix such penalty as in its discretion the court shall deem proper.

In January, 1935, a surprise move occurred in the form of an attempt to commit the United States to adherence to the International Copyright Convention. Technically this is not the correct title of the treaty (the Rome Revision of the Berne Berlin Convention for the Protection of Literary and Artistic Property) but it will be used for convenience. A bill to amend the Copyright Act of 1909, designed to lead to such adherence, was introduced with the sponsorship of the Department of State and had been referred, not to the Senate Committee on Patents, but to the Senate Committee on Foreign Relations. Due to vigilance on the part of Managing Director Loucks, a protest was filed in behalf of NAB and, in conjunction with protests filed by other organizations, caused the Senate Committee to refer the bill to the Department of State for the taking of further testimony.

The original bill already contained significant modifications of the existing law, some favorable and some un-

favorable to the broadcasting industry and other groups of users. Conferences were held before an Inter-Departmental Committee, with Mr. Wallace McClure of the Department of State as chairman. By March 28, 1935, the Committee was ready to submit a revised bill in which practically all the broadcasters' objections were met in a satisfactory manner. On April 1, the revised Bill (S. 3047) was introduced by Senator Duffy of Wisconsin and was referred to the Senate Committee on Patents.

Certain of the outstanding changes proposed by the bill were summarized by Managing Director Loucks in his report to the 1935 NAB Convention as follows:

- (1) the establishment of "automatic copyright" (i. e. copyright without the necessity for complying with any formalities), but with sharp limitations on the right of recovery of damages for infringement wherever registration and notice of copyright have not been had;
- (2) a material enlargement of the "writings" for which copyright may be secured, but no acceptance of the general European theory of "oral" copyright;
- (3) a considerable limitation of the right of injunction in cases where infringement of copyright is claimed;
- (4) the complete elimination of the fixed minimum statutory damage provision of the existing law, leaving the measure of damages in each case to be determined by the court;
- (5) the grouping together of all infringements by any one infringer up to the date of judgment, with the provision that any unauthorized network performance shall be regarded as the act of one infringer;
- (6) the reversal of the present law, as established in the Jewell-LaSalle case, by providing that there shall be no liability, civil or criminal, for the reception of any copyrighted work by the use of a radio receiving set, except where special admission fees are charged;
- (7) a provision regarding the "author's moral right," based on the very broad provisions of the Rome Convention but so modified as to give users considerable freedom in adapting copyright material for their special requirements.

Protection is given the copyright owner against unauthorized broadcasting of any copyrighted writing (including the reading of prose or poetry). The writings to which copyright protection is extended include

"Works prepared expressly for radio broadcasting, or for recording by means of electrical or mechanical transcription, including programs and continuities in so far as they embody original work of authorship."

The Senate Foreign Relations Committee had already voted to report favorably on the proposed ratification of the International Copyright Convention. On April 19, 1935, the Senate suddenly ratified the treaty. On April 22nd, the action was rescinded and, at the request of Senator Duffy and with unanimous consent, the measure was returned to the executive calendar.

On May 8th the Senate Patents Committee, in executive session, heard eight witnesses (including ASCAP representatives) who opposed certain phases of the Duffy Copyright Bill, as the bill was now called. The witnesses were given opportunity to submit briefs.

On June 17th the Bill (S. 3047) was favorably reported by the Senate Patents Committee. In the report Senator McAdoo, Chairman of the Committee, explained at length the elimination of the \$250 statutory minimum penalty for infringement, saying that the purpose of the amended provision is

"to accord a remedy for infringement, not a weapon under which the owners of copyright may stimulate the sale of their works."

At the NAB Convention held at Colorado Springs, July 8-10, 1935, a resolution was adopted petitioning Congress speedily to enact the Duffy Copyright Bill. On July 26th the Managing Director, jointly with officials of the Motion Picture Theatre Owners of America and the American Hotels Association, issued a statement asking passage of the bill.

On August 7, 1935, the Senate passed the bill. On August 12th it was referred to the House Committee on Patents, but Congress adjourned before any action was taken by the House Committee.

Since the convening of Congress on January 3, 1936, no progress has been made with the bill in the House. No hearings have been held and no date is set for hearings. My best information is that it will be at least several weeks before hearings are held and I believe that there is justification for the conclusion that ASCAP is at least partly responsible for causing this delay. The House Committee has, at present prospects, only one calendar day, early in March, and if hearings have not been held and if the bill is not reported by that date, the chance of its becoming law are very slight.

Another interesting development was the introduction on January 27, 1936, of H. R. 10632, by Mr. Daly of Pennsylvania. It also is a bill to amend the Copyright Act of 1909 and follows very closely the Duffy Copyright Bill. It restores, however, most of the objectionable features of the present law and of the original State Department bill, including the minimum statutory damages of \$250 for each infringement. It gives extensive copyright protection to phonograph records as such. This bill has also been referred to the House Committee on Patents.

VII. CONCLUSIONS

To some extent this heading overlaps the next heading in which I set forth my recommendations, and it will not be necessary to enumerate certain conclusions which are implied in some of these recommendations. There are, however, certain conclusions to which separate attention should be called, even though some repetition is involved.

A. Reason for Failure of ASCAP Negotiations

That the combined efforts of over 300 stations to negotiate an improved contract with ASCAP and to give effect to just principles of compensation endorsed by several successive NAB Conventions met with complete failure must, I think, be attributed to the following causes:

1. *ASCAP's monopolistic power.* Even with the withdrawal of the Warner Brothers group, ASCAP controls 60% to 70% of the music used by a large proportion of broadcasting stations. This music is, at least in the present state of affairs, indispensable to practically all stations, both because it is necessary to meet the needs and desires of the listening public and because it would be virtually impossible for a station to avoid innocent infringements, with their attendant heavy penalties. So long as this power exists, and no element of competition is introduced or enforced among the members of the ASCAP group, the broadcasting industry must expect to be at a heavy disadvantage in negotiating with ASCAP.

The principal weapons open to the broadcasting industry against this power are:

- (a) proceedings under the anti-trust laws, such as the pending Government suit and the pending WIP suit;
- (b) amendment of the copyright law, and
- (c) the marshalling of an independent source of supply of non-ASCAP music, so as to be able to operate broadcasting stations temporarily without ASCAP music and without danger of innocent infringement.

These are referred to again below.

2. *Defects in the copyright law.* While I am treating this as a separate factor, it is closely interwoven with the first factor. The defects in the existing copyright law, which have made it possible for ASCAP to have and to wield arbitrary monopolistic power, are

- (a) The provision imposing minimum statutory damages of \$250 for each infringement, no matter how innocent;
- (b) The interpretation given to the law by the courts that, in the case of a network program, for example, not only the originating station but every affiliate station broadcasting the program and every receiving set in a hotel public room, restaurant, or other public place of a commercial character is infringing; in other words, the failure to recognize the principle of clearing copyright at the source;
- (c) The failure of the law to make provision for obviously innocent and unavoidable infringement, such as a broadcast of a football game during which a college band plays a copyrighted song;
- (d) The failure of the law to impose suitable restrictions on combinations and pools of copyright owners.

3. *The lack of an independent supply of music.* This is sufficiently covered both above and under a later sub-heading.

4. *The discriminatory ASCAP contracts of the networks.* The networks are obviously ASCAP's largest individual customers. In turn, they are very important members of NAB and as such have regularly been represented on NAB's Board of Directors and, until the last few weeks, have played an important role in all NAB copyright activities, including negotiations with ASCAP.

By securing more favorable contracts from ASCAP in 1932 than were given the rest of the industry, they were placed in a position where their interests in copyright have proved to be opposed to the interests of independent

stations from a financial point of view (although not, I believe, from a sound, long-range point of view). They face a substantially increased financial burden for copyright licenses if any method of compensation, such as a per piece or measured service basis, is adopted, even though the total paid to ASCAP is no larger than before. This accounts, I believe, at least in large measure, for their opposition to the per-piece or measured service plan, for their attitude toward five-year extensions of ASCAP contracts, for their opposition to the Government suit, and perhaps other points in the policies followed by them.

The discriminatory ASCAP contracts are, in my opinion, the fundamental reason for the lack of a united front on copyright in the broadcasting industry today.

5. *The network-affiliate contracts.* The group of stations affiliated with the two national network companies is very large and constitutes a very important group. When they are forced to follow a certain course of action in copyright, it is almost inevitable that the remaining independent stations will be forced to do likewise.

No more effective weapon was placed in the hands of ASCAP than the provisions contained in the network-affiliate contracts requiring the affiliate to have ASCAP and other licenses. These provisions subjected the affiliate stations to the danger of heavy liability not only to ASCAP but also to the networks.

6. *Pressure exercised by the networks.* As I have already stated, a member of the NAB Board has been informed by ASCAP that their telegraphic demand for signed contracts was *at the insistence of both major networks*. Certain other circumstances tend to corroborate this. If this is true, the loss of the last opportunity for negotiations must be ascribed to the networks as well as to ASCAP.

B. Prospect of Success in Future Negotiations with ASCAP

By success in future negotiations with ASCAP, I mean primarily, of course, the establishment of a sound basis for compensation, such as the per-piece or measured service plan, without any substantial increase in the amounts paid to ASCAP. I mean also the achievement of certain related objectives which need not be summarized here.

It is my conclusion that no important objective will be accomplished by more negotiations with ASCAP during the period covered by the five-year renewals. This conclusion is based on the following reasons:

1. The obstacles enumerated under the preceding subheading are still present, and unless removed they will continue to be present, and to block any progress by more negotiation.

2. By their conduct after the 1932 contracts had been forced on the broadcasting industry, Mills and other ASCAP representatives made it clear that, in spite of their oft-repeated protestations of willingness to negotiate, they were not willing to revise the contracts in any respect except on the basis of substantially increased compensation, and that their invitations to negotiate were inspired,

at least in part, by a desire to delay steps contemplated by the NAB or for other reasons to gain time. There is no reason to believe that any different tactics will be pursued during the next five years.

3. The only occasions in the past on which ASCAP has seemed really willing to negotiate have been when by reason of developments on other fronts the broadcasting industry seemed on its way toward achieving a measure of progress toward bargaining equality.

A corollary conclusion is that, to have any hope of success, the broadcasting industry must concentrate on removing so far as possible the obstacles which have been enumerated under the previous subheading. Such a program includes litigation, legislation, the establishment of an independent source of music supply, doing away with the discriminatory ASCAP contracts, eliminating the objectionable features from network-affiliate contracts, and any and all steps and proceedings necessary to these ends.

C. The Music Publishers Holding Corporation

No one contemplates with pleasure the prospect of increased cost for music due to (a) ASCAP's refusal to reduce its fees to a degree corresponding to the recent diminution of its repertoire and (b) the necessity of having to deal separately with, and pay license fees to, the Warner Brothers group, represented by Music Publishers Holding Corporation.

On the other hand, for the first time in the history of the broadcasting industry, progress was made toward sound objectives in the negotiation of the revised MPHC contract. The favorable features of this contract have already been summarized. If the broadcasting industry will give its support and cooperation, still further progress has been promised by MPHC and will be achieved with the negotiation of a further contract at the expiration of the current 3-months' period expiring March 31, 1936. If, on the other hand, broadcasters join in any movement to boycott Warner music, or refuse to take MPHC licenses for any reason other than a bona fide lack of need for such licenses, any further progress will be seriously prejudiced.

It is my conclusion that, in the present state of the law and the actual condition of affairs, it is to the advantage of all users of music and of the public that the Warner Brothers group be maintained as a separate licensing organization, for the following reasons:

1. Some possibility of competition is opened up in a field in which ASCAP now enjoys a virtual monopoly.

2. Important progress may be made toward developing a per-piece or measured service plan of compensation, demonstrating its feasibility and advantages and serving as an example to ASCAP and other licensing pools.

3. An ASCAP victory over the Warner group, whereby the latter is forced back into ASCAP, would be disastrous in its effect on music publishers and composers generally and on any tendency or willingness among them to work toward a sound solution of the problem.

Needless to say, my conclusions are *not* reached with a view to assisting the Warner Brothers group as such, but solely and simply because of the reasons above set forth.

D. The Government Suit

As stated in the NAB Bulletin sent out January 13, 1936, the Government suit "is as important now as it has been at any time in the past and its prosecution should be pursued with vigor."

Certain considerations must, however, be frankly faced. Among them are the following:

1. The Government's suit was definitely weakened and prejudiced by the action of the networks and WCAU in obtaining five-year extensions on the eve of trial.

2. The situation presented by the Government's petition has been somewhat altered by the withdrawal of the Warner Brothers group, and the actions of ASCAP and the networks in connection therewith.

3. The discriminatory network contracts (which are not mentioned in the Government's petition) and the objectionable provisions in the network-affiliate contracts have assumed an importance to the issues raised by the suit, not heretofore apparent.

4. The forcing of independent stations to accept five-year extensions with a diminished repertoire, by January 15, 1936, raises issues that may be of importance to the successful prosecution of the suit.

5. The terms of the new contracts between ASCAP and its members are not known and may contain provisions pertinent to the case.

Because of these considerations, it is my conclusion that the Attorney General should be informed of all the developments covered by this report and should be urged to have an intensive study made of the suit in the light of possible new issues and new evidence. It may be that the Government's petition should be amended or that new or supplemental proceedings should be instituted, and it would be unfortunate if the pending suit should result unfavorably for want of the taking of proper steps at this time. This study should be made and concluded at the earliest possible date, after which the suit in its present or in modified form should be prosecuted with all vigor.

E. The Duffy Copyright Bill

It is my conviction that no effort should be spared in attempting to secure enactment of the Duffy Copyright Bill in the form in which it was passed by the Senate in August, 1935. This is not because the bill remedies all the injustices worked by the present law or because it is free from objectionable new features. Neither is true. It is because it goes far to remedy one defect in the present law which overshadows all others; it eliminates the minimum statutory damage of \$250 for each infringement, no matter how innocent, without which the arbitrary power of ASCAP to force unacceptable and unjust contracts on the broadcasting industry and on other groups of users of music would be greatly lessened.

Recent developments, however, force me to the conclusion that

(1) without a determined effort on the part of the broadcasters and other groups of users, the Duffy Bill will not be passed by the House this session, or,

(2) even if it reaches the state of being voted on by the House, there is serious danger that the \$250 minimum damage provision will be restored, and that only the utmost vigilance will prevent this.

If the bill is not passed this session, then the whole procedure must be recommenced, since the next session will be that of a new Congress. If this is so, then it is proper to consider whether the broadcasting industry should not then endeavor to secure a remedying of other defects in the present law not cured by the Duffy Bill. What I have in mind is that, after acquainting the Senate and House Patent Committees with the more recent developments and problems, we should ask definitely for provisions that would

(1) render any licensing pool illegal unless it operates on a per-piece or measured service basis, is open on fair and equitable terms to all persons owning or controlling performing rights, and preserves competition between such persons, and

(2) confine infringement suits, in the case of network programs, to the originating station.

F. An Independent Music Supply

It is my conclusion that the failure of the Radio Program Foundation to achieve the results expected of it is *not* due to any want of inherent merit in this part of the NAB program but rather (1) inadequate financing, (2) apathy on the part of the NAB, its directors and members and the networks, and (3) insufficient experienced personnel. There were, of course, minor defects and mistakes which, in my opinion, could all be remedied if another attempt is made.

It is my further conclusion that there is no more important feature of sound copyright program for the NAB than the establishing of an independent source of music supply such as was attempted in the Radio Program Foundation. This is not the place in which to present a detailed proposal; it should be made in a separate report confined to this one subject. Among the objectives to be accomplished by such an institution are the following:

1. The purchase, sales and licensing of performing rights.

2. The compilation and distribution of catalogs.

3. The collecting of information with respect to public domain music and, if necessary, the making of such music available.

4. The compilation and distribution of information regarding music (whether copyrighted, by whom controlled, and whether in the public domain) used in the manufacture of electrical transcriptions and phonograph records.

5. Entering into agreements with foreign copyright owners and licensing pools.

6. If necessary, the publication of music.

Not all these functions need necessarily be lodged in a separate corporation. Some of them (such as the distribution of catalogs) might well be considered to be more properly exercised directly by the NAB, through a copyright bureau.

There are, of course, problems with reference to the form of corporation, financing, the sale of stock, limitations on stock control, the profit or non-profit character of the enterprise, etc., which must be studied and in connection with which legal advice will be necessary. If the corporation is adequately financed and supported, none of those problems offers any serious difficulty.

G. The International Situation

On February 27, 1936, a meeting of the *Union Internationale de Radiodiffusion* (U. I. R.) opens in Paris, and during a week or more one of the principal subjects of debate will be copyright. The U. I. R. is composed of practically all the European broadcasting organizations and of many outside of Europe. In this country, the NAB is a member. The two networks and one independent clear channel station are the only members from the broadcasting industry. The copyright problems revolve mainly on the forthcoming international conference on copyright to take place next September, and have to do with proposals that the manufacturers of electrical transcriptions and phonograph records, as such, be given extensive copyright protection, and likewise that performing artists be given similar protection. These proposals are being vigorously urged and cannot be ignored.

If the United States should ultimately adhere to the Convention, it will be bound to give effect to its provisions in the law of this country. It is my conclusion that within practical limits, the NAB should do everything in its power to support the U. I. R. in the position it is taking in opposition to the proposals. It is also my conclusion that any adherence to the Convention by the United States should be postponed until after it is known what the provisions of the Convention are to be.

VIII. RECOMMENDATIONS

My recommendations must necessarily be somewhat in the alternative, depending on whether and how the Board of Directors chooses between the following courses of action:

1. To determine itself the copyright program for the NAB until the next Annual Convention, including the adoption or rejection of my recommendations hereinafter set forth,* or

2. To call a special meeting of the NAB and to refer some or all of my recommendations to the membership for action, or

3. To refer this report with its conclusions and recommendations to the membership of the NAB, and to ask the members to determine whether a special meeting shall be called.

There is evidence of some sentiment in favor of a membership meeting at an early date but, without a poll of the members, I am unable to tell whether the sentiment

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is sufficiently widespread to justify the calling of such a meeting, with its attendant expense and inconvenience to the members. Under the By-Laws, a special meeting of the members may be called on 15 days' notice on request of either eight directors or of one-third of the members. The suggestion has been made that the date of the Annual Meeting be advanced to some date in the early future but I am inclined to believe that a special meeting would be preferable. A special meeting could be more easily confined to the pressing problems (principally in copyright), would be free of election turmoils, and would not be so likely to be interrupted by social functions.

I am not making any recommendations, therefore, as to whether a special meeting should or should not be called. Both the advantages and the disadvantages of such a course are more or less obvious and need not be recited. It seems to me that the answer to the question depends largely on whether the Board chooses to act on certain of the recommendations set forth below or to refer them to the members for discussion.

My recommendations are as follows:

Printing of the Report

1. That the Managing Director be authorized to print and distribute this report, together with a statement of the Board's actions thereon, to NAB members and to such other persons as in the judgment of the Managing Director have a legitimate interest therein.

Approval and Ratification of Actions of the Managing Director and the Advisory Committee

2. That the actions of the Managing Director and his Advisory Committee in the field of copyright since the December meeting of the Board of Directors be approved and ratified, both generally and particularly with respect to the following:

- (a) Their attempts to negotiate a better license arrangement with ASCAP and their acceptance in the interim of a temporary arrangement cancellable on two days' notice.

- (b) Their attempts to negotiate a better license agreement with Music Publishers' Holding Corporation and their actions in advising broadcasters of the improved terms of the revised contract and in acting as intermediary for stations desiring to accept said contract.

- (c) Their adoption of the "Tentative Program of Activity in Behalf of the NAB," as contained in the printed NAB bulletin and issued January 13, 1936.

Policies with Respect to Copyright

3. That the resolutions adopted by the NAB at its 1935 and earlier Conventions, declaring in favor of the per-piece or measured service plan of compensation for performing rights be re-affirmed.

4. That all discriminations in ASCAP license agreements (as well as in the license agreements of any other copyright pool) be declared wrongful and against the best interests of the broadcasting industry and of the

public, including the discriminations involved in the network contracts, the newspaper-owned station contracts and the WCAU contract, and such discrimination should be done away with.

5. That those provisions in network-affiliate contracts requiring affiliate stations to have ASCAP or other licenses be declared to constitute an undue burden on affiliate stations, a serious obstacle to successful negotiations both in behalf of affiliate stations and of all other independent stations, and an unfair weapon in the hands of ASCAP and the networks, and such provisions should be eliminated from said contracts.

6. That, in the case of network programs, the NAB declare itself in favor of clearance of copyright at the source so that only the originating station will be held responsible for infringement and affiliate stations will be under no obligation to secure licenses with respect to such programs or to bear responsibility for any infringements that may occur therein.

7. That, generally, Part A of the above-mentioned "Tentative Program of Activity in Behalf of the NAB" be approved as a correct statement of the policies to be followed in negotiating license arrangements with ASCAP and other licensing pools.

8. That the action of ASCAP in refusing to reduce its fees by an amount corresponding to the diminution of its repertoire consequent on the withdrawal of the Warner Brothers group be declared to be arbitrary and unjust.

9. That the possibility of competition and of a sound basis for compensation offered by the withdrawal of the Warner Brothers group from ASCAP be declared, in the present state of the law and in view of the arbitrary power exercised by ASCAP, to be wholesome and in the interest of the broadcasting industry; that broadcasters be urged to do everything in their power to prevent a forcing of the Warner Brothers group to return to ASCAP, and that any attempt to refuse to deal with the Warner Brothers group for such purpose be condemned.

10. That the Officers and Directors of the NAB be authorized and instructed to take any and all necessary and proper steps to put the foregoing policies into effect.

The Government Suit

11. That the Managing Director be instructed to bring the contents of this report, together with any other facts pertinent thereto, to the attention of the Attorney General; to urge upon the Attorney General the imperative necessity for an immediate study of the Government suit against ASCAP and for a determination whether amendments or new or additional proceedings are necessary or advisable to attain the objectives sought to be accomplished by that suit; and to urge upon the Attorney General the imperative necessity for an early resumption of the prosecution of that suit either in its original or in amended or modified form.

The Duffy Copyright Bill

12. That the Managing Director be instructed to bend every effort to bring about enactment of the Duffy Copy-

right Bill (S. 3047) in the form in which it passed the Senate, and to oppose any attempt to insert or restore minimum statutory damages or penalties for infringement; and, if it should appear that enactment of the Bill in satisfactory form is impossible at this session, the Managing Director is further instructed to consider and to report back to the Board of Directors on the advisability of seeking further amendments to accomplish the following objectives:

(a) To render any licensing pool illegal unless it operates on a per-piece or measured service basis, is open on fair and equitable terms to all persons owning controlling performing rights, and preserves competition between such persons.

(b) To confine infringement suits, in the case of network programs, to the originating station.¹

Radio Program Foundation

13. That the need for the immediate establishment of a corporation having substantially the same purposes and powers as the Radio Program Foundation be recognized, and that the Managing Director be instructed to prepare and submit to the Board at an early date a detailed plan and program for the establishment of such a corporation and its successful operation.

International Copyright Problems

14. That the importance of the copyright questions to be discussed at the U. I. R. Meeting to be held at Paris, beginning February 27, 1936, and to be determined at the Conference to be held at Brussels, beginning September 7, 1936, be recognized and that the Managing Director be instructed to take any steps that may be necessary to protect the interests of American broadcasters in the questions to be discussed and decided.

Assistance to the Managing Director

15. That the Managing Director be authorized to retain legal counsel and such other assistance as may in his judgment be necessary or advisable for the successful accomplishment of the objectives herein decided upon.

* * *

In pursuing this or any other program it cannot be made too clear that it is in the best interest not only of the broadcasting industry but of the public that every encouragement be given to writers and composers of music, both for the sake of the advancement of their art as such and in order that a constant supply of music of the best quality be made available to listeners. To accomplish this, as I know is realized by the entire industry, no scheme will succeed that attempts to do anything less than compensate them, and compensate them generously for their work and their talent. It is not that the broadcasting industry desires, or ever has desired, to escape this obligation that it has engaged in its copyright activi-

¹ The Duffy Copyright Bill, in its present form, goes a long way towards, but still falls somewhat short of, accomplishing this objective.

ties but rather that it desires, and justly, that it be required to pay only for what it uses and that the fees paid by it actually reach those to whom they are due.

Respectfully submitted,

JAMES W. BALDWIN,
Managing Director.

RECORD OF BOARD ACTION

In acting on the above recommendations, the Board by majority vote adopted the following:

Printing of the Report

1. That the Managing Director be authorized to print and distribute this report, together with a statement of the Board's actions thereon, to NAB members and to such other persons as in the judgment of the Managing Director have a legitimate interest therein.

Approval and Ratification of Actions of the Managing Director and the Advisory Committee

2. That the actions of the Managing Director and his Advisory Committee in the field of copyright since the December meeting of the Board of Directors be approved and ratified, both generally and particularly with respect to the following:

(a) Their attempts to negotiate a better license arrangement with ASCAP and their acceptance in the interim of a temporary arrangement cancellable on two days' notice.

(b) Their attempts to negotiate a better license agreement with Music Publishers' Holding Corporation and their actions in advising broadcasters of the improved terms of the revised contract and in acting as intermediary for stations desiring to accept said contract.

(c) Their adoption of the "Tentative Program of Activity in Behalf of the NAB," as contained in the printed NAB Bulletin and issued January 13, 1936.

Policies with Respect to Copyright

3. That the resolutions adopted by the NAB at its 1935 and earlier Conventions, declaring in favor of the per-piece or measured service plan of compensation for performing rights be reaffirmed.

4. That all discriminations in license agreements in respect of commercial stations be declared wrongful and against the best interests of the broadcasting industry and of the public, and such discriminations should be done away with. (Note: Specific references to actual existing discriminatory contracts were stricken from the recommendation as originally made.)

6. That, in the case of network programs, the NAB declare itself in favor of clearance of copyright at the source so that only the originating station will be held responsible for infringement and affiliate stations will be under no obligation to secure licenses with respect to such programs or to bear responsibility for any infringements that may occur therein.

8. That the action of ASCAP in refusing to reduce its fees by an amount corresponding to the diminution of its repertoire consequent on the withdrawal of the Warner Brothers group be declared to be arbitrary and unjust.

10. That the Officers and Directors of the NAB be authorized and instructed to take any and all necessary and proper steps to put the foregoing policies into effect.

The Duffy Copyright Bill

12. That the Managing Director be instructed to bend every effort to bring about enactment of the Duffy Copyright Bill (S. 3047) in the form in which it passed the Senate, and to oppose any attempt to insert or restore minimum statutory damages or penalties for infringements; and, if it should appear that enactment of the bill in satisfactory form is impossible at this session, the Managing Director is further instructed to consider and to report back to the Board of Directors on the advisability of seeking further amendments to accomplish the following objectives:

(a) To render any licensing pool illegal unless it operates on a per-piece or measured service basis, is open on fair and equitable terms to all persons owning controlling performing rights, and preserves competition between such persons.

(b) To confine infringement suits, in the case of network programs, to the originating station.

Radio Program Foundation

13. That the need for the immediate establishment of a corporation having substantially the same purposes and powers as the Radio Program Foundation be recognized and that the Managing Director be instructed to prepare and submit to the Board at an early date a detailed plan and program for the establishment of such a corporation and its successful operation.

International Copyright Problems

14. That the importance of the copyright questions to be discussed at the U. I. R. Meeting to be held at Paris, beginning February 27th, 1936, and to be determined at the conference to be held at Brussels, beginning September 7th, 1936, be recognized and that the Managing Director be instructed to take any steps that may be necessary to protect the interests of American broadcasters in the questions to be discussed and decided.

Assistance to the Managing Director

15. That the Managing Director be authorized to retain legal counsel and such other assistance as may in his judgment be necessary or advisable for the successful accomplishment of the objectives herein decided upon.

The Board extended the authority given their Managing Director in December to select as Advisory Committee to confer and advise with him.

Minority Report of Harry C. Butcher

I heard Jim Baldwin read the foregoing report at the Chicago Board meeting.

To attempt to answer or even to clarify a 21,000-word report covering several years of copyright history would require perhaps another 21,000 words. You would "tune-out" long before you got to me.

The apparent purpose of rehashing past history seems to be to make the networks the "goats." I notice particularly that the report disregards what to me is the unquestionable fact that all of the NAB copyright activities to date have resulted in increasing the cost of music to broadcasters generally and engendering bitterness among various groups of broadcasters.

Last summer after two years and a half of negotiation, the broadcasters had no idea on what terms they could renew their ASCAP licenses and they did not know whether they could renew for one year, or five, or ten, on any terms. It is perfectly true that the networks played a leading part in negotiating a new 5-year contract, enabling all broadcasters to go on without paying any more than they had been paying, with the sole exception of the networks themselves, who did consent—in order to get all broadcasters including themselves out of their difficulties—to pay substantially larger sustaining fees for their key stations. It is not the fault of the networks that many broadcasters were induced not to avail themselves of this opportunity.

But words, words and words—talk, talk and talk—are not what broadcasters want and need on copyright. They want action along constructive lines.

So I will content myself with a few observations—and the reiteration of a practical suggestion for constructive united action made at the Chicago meeting.

I have already said that I am not going to attempt to answer Jim Baldwin but I am tempted to hit a few of the high spots. On the authority of some anonymous informant in ASCAP, it is stated that the networks inspired or influenced the sending by ASCAP of the telegram which required all broadcasters to renew their contracts by January 15 of this year. That statement is untrue. Representatives of both networks were called into a meeting of the entire ASCAP Board on January 10 and the telegram was read to them and they were informed that it had already been sent. I have confirmed by numerous witnesses that this was the case and that the networks had no knowledge of the telegram in advance.

Jim Baldwin's report furthermore seems to me to be founded on basic misconceptions, the most important of which is that there is a fixed and definite amount of money to be paid for copyrights and that the question at issue is how much of that fixed amount the independent station should pay and how much the networks should pay. This is not the fact. All the copyright interests are unanimous in seeking larger and larger sums from all broadcasters, whether network or independent stations. Those who subscribe to this misconception have wittingly or unwittingly fallen for some of our opponent's

insidious propaganda which is intended to split the broadcasters and which, unfortunately, is showing rather ghastly success.

It also seems to me that undue stress is put on the fact that our network contracts require affiliated stations to have ASCAP licenses. This clause was put into contracts years ago for the protection of the local stations, ourselves and the clients of both. It is not practical to carry on network broadcasting without an ASCAP license. It is not practical to carry on network broadcasting without transmitters at local stations. But the local stations don't get indignant at us because they have to have transmitters.

Our contracts also recognize that affiliated stations must have licenses from the Federal Communications Commission and our mutual operations are based upon performance thereunder. If we were to remove the ASCAP clause from our contracts, would it lessen the local station's need for an ASCAP license any more than deletion of reference to the Government license in our contracts would lessen the local station's need of that license?

Furthermore, anyone who actually knows the temper and disposition of ASCAP is well aware that it would be utterly impossible to persuade ASCAP to allow local stations to go unlicensed. ASCAP on the contrary was utterly determined that there should be neither network broadcasting nor local broadcasting unless the stations were licensed for both. We don't control ASCAP. (We sometimes wish we did.)

Now, finally, for a constructive note. I find no mention in Mr. Baldwin's report or press release (in which he sums up the batting average of his own recommendations to the Board) of the most promising development at the Chicago meeting. I refer to a general agreement which was reached at the end of that meeting. This agreement was to the effect that the broadcasters, including the controlling and operating heads of the network companies, should sit down and try to put an end to the bickering and the name-calling, and see if together they could work out some constructive actions for and in behalf of all broadcasters. This suggestion, made by Ed Craig of WSM, Nashville, was endorsed by all who attended the Chicago meeting. The heads of my company stand willing to participate whole-heartedly in such a meeting. We are ready to support any fair and constructive measures which such a meeting may evolve. Such a meeting should consider among other things a practical plan for creating, financing and operating a music pool for all broadcasters. I urge that immediate action be taken to convene such a meeting. And until a program looking toward the future has been worked out, I deplore the issuance of statements and reports which serve only to split our own ranks to the advantage of our adversaries, and I suggest that until the results of such a meeting are made known, every broadcaster should preserve an open mind.

Respectfully submitted,

HARRY C. BUTCHER.

[fol. 311A]

EXHIBIT TO AFFIDAVIT

Copyright Office of the United States of America,
Washington, D. C.

I hereby certify that the following list shows the number of original and renewal registrations of copyright for musical compositions made from January 1, 1909 to December 31, 1936, inclusive by years:

Copyright Registrations of Music List

Year	Published(1)	Unpublished (2)	Total	Renewals
1909-Jan. 1-June 30..	(2)	(2)	12561
1909-July 1-Dec. 31..	9449	237	9686	157
1910.....	25838	1366	27204	667
1911.....	29113	1465	30578	546
1912.....	25729	932	26661	656
1913.....	25894	1395	27289	586
1914.....	24720	1532	26252	624
1915.....	18684	2382	21066	686
1916.....	16315	3658	19973	877
1917.....	15612	5376	20988	920
1918.....	18438	6362	24800	1031
1919.....	19333	7959	27292	853
1920.....	22849	8765	31614	1005
1921.....	21459	7472	28931	1244
1922.....	20084	7104	27188	1443
1923.....	18133	7339	25472	1769
1924.....	18639	8270	26909	1658
1925.....	18407	7746	26153	2235
1926.....	15829	8816	24645	2483
1927.....	18425	8022	26447	3185
1928.....	18487	8895	27383	3100
1929.....	16778	12642	29420	3654
1930.....	17272	16148	33420	4236
1931.....	14311	16596	30907	3453
1932.....	12411	15992	28403	3827
1933.....	11196	14796	25992	3958
1934.....	11213	16640	27853	5047
1935.....	11490	18192	29682	4933
1936.....	12317	21587	33904	5849
Total.....	508425	237686	758672	60682

Notes:

(1) Includes an indeterminate number of published musical compositions also registered as unpublished under section 11 of the Copyright Act, as well as new arrangements of copyrighted works.

(2) Not recorded separately.

In Witness Whereof the seal of the Copyright Office has been affixed this tenth day of April, 1937.

C. L. Bowie, Register of Copyrights. (Seal.)

[fol. 312] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF L. S. MITCHELL

L. S. Mitchell, being first duly sworn, deposes and says: that he is the manager of Radio Station WDAE, located in Tampa, Florida. That said Radio Station first commenced operations about 1923 and has continued in operation since that time; that said Station operates with a power of 5,000 Watts during the day time and 1,000 Watts at night pursuant to a license from the Federal Communication Commission. That the only other radio station located in Tampa is Station WFLA; that said Station WFLA operates with a power of 5,000 Watts during the day time and 1,000 watts at night pursuant to a license from the Federal Communication Commission.

That Radio Station WDAE caters to the same potential listening audience in and about the City of Tampa, Florida, as Radio Station WFLA; that Radio Station WFLA first commenced operations about 1925 and since that date Radio Station WDAE has been and continues to be in direct competition with said Radio Station WFLA in the sale of its broadcasting facilities to the radio advertising public located in the Tampa trade area.

That Radio Station WDAE has a license issued by the American Society of Composers, Authors and Publishers, one of the complainants in the above entitled suit, which authorizes such station to perform any and all of the musical compositions owned or controlled by any member of said Society, which license provides amongst other things that said Society in its discrimination and without any reason therefor may withdraw from public performance any copyrighted musical composition coming under the provisions of said license, that under the terms of said license Radio Station WDAE is obligated to pay to the said Society \$500.00 per year plus 3% of the first \$25,000.00 of income derived from the sale of broadcasting facilities for programs in which music controlled by said Society is rendered and 5% of the receipts from such sales in excess of \$25,000.00. Radio Station WDAE does not pay to the said Society any percentage of its income derived from programs which do not use music controlled by said

Society. A photostat copy of the license contract between Radio Station WDAE and the said Society, together with a photostat copy of the letter extending said agreement to December 31, 1940, is attached hereto and made a part hereof.

That on or about January 15, 1936, Radio Station WDAE was forced to accept the demands of the complainant Society and accept the extension of its license contract to December 31, 1940, without any reduction in the amount of the fee demanded by the Society although the music publishing subsidiaries of the Warner Brothers Picture Corporation had withdrawn from membership in the Society; that it is and has been impossible for Radio Station WDAE or any other broadcasting station to perform musical compositions without at some time performing compositions coming under the control of the said Society.

(Signed) L. S. Mitchell.

Sworn to and subscribed before me this 28th day of February, 1938. Virginia E. James, Notary Public, State of Florida at Large. My Commission expires Aug. 5, 1941. (Notarial Seal.)

[fol. 314]

EXHIBIT TO AFFIDAVIT

Operator's Broadcasting License for Newspaper-owner
Station

No: —. Call: —

Memorandum of agreement between American Society of Composers, Authors and Publishers (Hereinafter Styled "Society"), and Tampa Publishing Company (hereinafter styled "Licensee"), conducting a radio broadcasting station 51% or more owned and operated by a daily newspaper as follows:

1. Society grants to Licensee, and Licensee accepts for a period of three (3) years from October 1, 1932, a license to publicly perform by broadcasting from Radio Station W. D. A. E. located at Tampa, Florida, non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed

by members of Society, or of which Society shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant thereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society shall have the right to license the performing rights hereinbefore granted, in programs rendered at [fol. 315] or from said radio station, or at or from any other place duly licensed by Society to perform such works (unless the performance originates at a place or from a source which Society does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that Licensee shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after Licensee shall have received notice from Society that such other places are not licensed by Society to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1,000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, Licensee shall promptly notify Society thereof, and either Society or Licensee may then terminate this agreement, and in such event Licensee shall be under no further liability to Society for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event Licensee shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. Licensee agrees upon request to furnish to Society during the term of the within license a list of all musical compositions (or, at the option of Licensee, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station; showing the title of each composition and the composer and/or author thereof; provided that Licensee shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by Licensee to Society shall be strictly confidential and Society covenants that it will make no disclosure thereof or of the contents thereof.

7. Society agrees during the term hereof to maintain for the service of Licensee substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society. Society reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions, and upon any such withdrawal, Licensee may immediately cancel the within agreement by giving written notice to Society of its election so to do.

In the event of any such cancellation by Licensee, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof,

or otherwise, Society shall refund to Licensee pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Society, as compensation for the within license, the sum of Five Hundred and 00/00 Dollars, (\$500.00) per annum payable in equal monthly installments [fol. 317] on or before the 10th of each month during the term hereof, plus, during each year of the term hereof, a sum equal to three per cent (3%) of the gross amount of receipts of Licensee from the sale of broadcasting facilities for programs in which music copyrighted or composed by members of Society is rendered, until such receipts shall have reached the total sum of Twenty Five Thousand and 00/00 (\$25,000.00) Dollars; and five per cent (5%) of all such receipts in excess of the foregoing amount.

It is, however, understood and agreed that in no event shall the total aggregate sum payable by Licensee to Society during any single year of the term hereof be less than Two Thousand and 00/100 (\$2,000.00) Dollars, and the deficit, if any, of such total aggregate sum in respect of any single year to the last stated amount shall be paid within thirty days of the receipt by Licensee from Society of a bill covering such deficit.

Provided, however, that gross receipts of the Licensee in respect of all commercial ("spot") announcements either interpolated between or preceding or following programs containing music copyrighted or composed by members of Society shall be subject to percentage payments as aforesaid. Public service announcements such as time announcements, weather and market reports, etc., shall be exempt from such percentage payments as shall also be broadcasts of political conventions, civic gatherings, parades, public functions and sports events, such as football and baseball games, as to music played thereat by bands attendant at such events. Nor shall any percentages be payable to Society in respect of service charges connected with the transmission of a non-commercial program from a remote control point to the studio of Licensee.

[fol. 318] Licensee shall render monthly statements to Society on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by Society and shall include in such statement all

gross receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station for programs wherein any music copyrighted or composed by members of Society shall have been included. Which said statement shall be rendered under oath and accompanied by the remittance due Society under the terms hereof. Any such statement may also include a deduction by or credit to the Licensee for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount". In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of Licensee on the monthly statement next succeeding the date of the actual collection.

9. Society shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of Licensee only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by Licensee.

It is understood and agreed that Society shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, Society may give Licensee ten (10) days notice in [fol. 319] writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said ten (10) days, Society may then forthwith cancel said license.

11. Society agrees to indemnify, save and hold Licensee harmless, and defend Licensee from and against any claim, demands or suits that may be made or brought against the Licensee with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in Society's repertoire heretofore or hereafter during the term hereof copyrighted or composed by members of Society.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee on account of any such matter as is hereinabove referred to, Licensee

shall forthwith give Society written notice thereof and simultaneously therewith deliver to Society any such notice, process, paper or pleading, or a copy thereof, and Society shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. Licensee, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for Society shall cooperate. Licensee shall cooperate with Society in every way in the defense of any such action or proceeding and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Society, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

[fols. 320-321] In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against Licensee, on account of the rendition of any musical composition contained in the Society's repertory but Not heretofore or hereafter during the term hereof copyrighted or composed by members of Society, Society agrees at the request of Licensee to cooperate with and assist Licensee in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. In the event of any change in the ownership or control of the said station whereby it becomes less than 51% directly owned and controlled by the Licensee, Society may, at its option, cancel and terminate this license upon 30 days' written notice.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

In Witness Whereof, this agreement has been duly subscribed by Society and Licensee this 8th day of October, 1932.

American Society of Composers, Authors and Publishers, by A. E. Arnold. Tampa Publishing Company, Licensee, by — — — (Seal.)

[fol. 322] American Society of Composers, Authors and
Publishers,

Thirty Rockefeller Plaza,

New York City

January 15, 1936.

Tampa Publishing Company, Radio Station W.D.A.E.,
Tampa, Florida

GENTLEMEN:

It is mutually agreed that the certain license agreement between us, dated October 8, 1932, effective October 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by [fol. 323] giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

Very truly yours, American Society of Composers,
Authors and Publishers, by Herman Grunbery.

Accepted: Radio Station W.D.A.E., by David L. Smily,
(Title) President.

Dated January 15, 1936.

[Title omitted]

AFFIDAVIT OF GILBERT FREEMAN

Gilbert Freeman being first duly sworn deposes and says:

That he is President of the Florida-Capitol Broadcasters, Inc., operator of radio station WTAL located in the city of Tallahassee, Florida; that he has examined the printed copy of the "Hearings before the Committee on Patents, House of Representatives, Seventy-first Congress, Second Session, on H. R. 9639, a Bill to Amend the Act entitled 'An Act to Amend and Consolidate the Acts Respecting Copyright,' approved March 4, 1909", conducted on March 4, and 5 and April 2, 1930; that the printed manuscript of said hearings bears the publication notice "United States Government Printing Office, Washington, 1930"; that the following extract is a true and complete copy of that portion of the [fol. 325] testimony or statement of Gene Buck, President of the American Society of Composers, Authors and Publishers, as it appears on page 5 of said official publication:

"In former times they have told you about the American Society—a terrific, monopolistic chimera that was just going to take the Victor Co. and the motion-picture industry right out of business. Let us put the cards on the table and see what the American Society is. *The American Society is an organization which consists of all the authors and composers, and their publishers in America* brought together because in the year 1914 my dear beloved friend, Victor Herbert, found that a restaurant on Broadway was taking one of the numbers from his opera, having a person in costume come out with an orchestra and sing his song without asking Herbert's permission, and making a covert charge."

That he has examined the printed copy of the "Hearings held before the Committee on Patents, House of Representatives, Seventy-Second Congress, First Session on H. R. 10976, a Bill to Amend and Consolidate the Acts Respecting Copyright and to Codify and Amend Common Law Rights of Authors in their Writings". That said hearings were held March 21, 24, 25, 1932 and that said printed manuscript of said hearings bears the publication notice "United States Government Printing Office, Washington 1932"; that the

following extract is a true and complete copy of that portion of the testimony or statement of Gené Buck, President of American Society of Composers, Authors and Publishers as it appears on page 213 of said official publication:

"Mr. Boland: The American Society of Composers, Authors and Publishers; I believe—I may be wrong—does not control much more than one-half of the popular music."

"The Chairman: Why, Mr. Buck told me they control 95 per cent."

"Mr. Buck: The copyrighted works."

[fol. 326] "The Chairman: Can you prove that to me?"

"Mr. Buck: Yes."

That he has examined the booklet entitled "How the Public Gets Its New Music" on the first page of which appears the name and official seal of the "American Society of Composers, Authors and Publishers, 1501 Broadway, New York, N. Y."; that the publication date shown on the second page of said booklet is "First Printing, April, 1933, Second Printing, May, 1933, Third Printing, August, 1934;" that the following extracts are true and accurate copies of portions of pages 3, 4, 7 and 25 respectively:

"The membership of the American Society of Composers, Authors and Publishers consists of 808 men and women, citizens of the United States of America, who are the creators of the bulk of the best music of all types originating in this country. The Society also represents more than 45,000 composers, authors and publishers of musical works scattered throughout sixteen foreign countries. The genius and skill of these people in the art of composing music and the industry of publishing it bring into existence the product which makes possible the operation of radio broadcasting as a popular entertainment medium and of nearly all commercial public amusement enterprises." (Page 3.)

"Music is an absolute essential to the successful commercial operation of a radio broadcasting station, a motion picture theatre, a cabaret, an amusement park, a dance hall and similar enterprises. As a supply of cotton is essential to the operation of a textile mill, or wheat to a flour-mill, so without music there would be no such thing as radio broadcasting as we know it nor would the commercial operation of thousands of places of public amusement be possible for

the entertainment of the millions of people who patronize them daily." (Page 4.)

"It is the ambition of the Society to encourage and support in a practical way the men and women of genius who write the music and songs of America because they are supplying in a constant and steady stream the flow of new music which is an absolute essential to the successful operation of nearly all public amusement enterprises." (Page 7.)

"Music is the 'raw Material' from which the radio industry makes its programs. Estimates of the use of music on the radio vary but it is generally conceded that 86 per [fol. 327] cent of the radio programs are made up of music. Not all of this music is owned by members of the Society, as much of it belongs to non-members and a considerable part of it is in the public domain, but generally speaking the major part of the music used is new, popular music, recently or currently written by the American Songwriting fraternity, most of whom belong to the Society." (Page 25.)

(Signed) Gilbert Freeman.

Subscribed and sworn to before me this 28 day of February, A. D. 1938. A. R. Mann, Notary Public, State of Florida at Large. My Commission expires May 6, 1940. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROBT. M. TIGERT

On this day personally appeared before me, the undersigned authority, Robert M. Tigert, who being by me first duly sworn, deposes and says:

That he is the Manager of Radio Station WFOY operating at St. Augustine, Florida; that said Radio Station has a contract or license agreement with The American [fol. 328] Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all of said Society's members and of all members of foreign affiliations with such Society. That said agreement was entered into March 1st, 1937, and will expire three years and ten months

after date. Pursuant to said license agreement, the said Radio Station is obligated to pay to said Society the sum of \$100.00 per year plus 5% of its gross income. That the payments aforesaid are payable each month and that subsequent to June 9th, 1937, a check was forwarded by United States Mail each month for the months of June, July and August. Said checks were forwarded to said Society at its New York Office. That the envelopes containing said checks were returned unopened. That the sealed envelopes containing said checks have been kept by affiant for delivery to said Society at any time that the Society will accept same. That no other checks were forwarded to the Society in accordance with said agreement because affiant considered it would be futile acts. However, said Radio Station stands ready, willing and able to comply with its said contract in all respects, and that all of the payments due said Society are available for payment at any time that they will be accepted.

(Signed) Robert M. Tigert.

Subscribed and Sworn to before me, this 28th day of February, A. D. 1938. Josephine Versaggi, Notary Public, State of Florida at Large. My Commission expires Nov. 19, 1940. (Notarial Seal.)

[fol. 329] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF W. WRIGHT ESCH.

This day personally appeared before me the undersigned authority W. Wright Esch who, after being duly sworn deposes and says:

That he is the owner of Radio Station WMFJ operating at Daytona Beach, Florida; That said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, Authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to said Society the sum of \$250.00

per year, plus 15% of its gross income. That the payments aforesaid were made up to June 1st, 1937 after which date the said Society has refused to accept payments on said contract.

(Signed) W. Wright Esch.

Sworn to and subscribed before me this 26th day of February 1938. H. R. Scott, Notary Public, State of Florida at Large. My Commission expires January 30, 1942. (Notarial Seal.)

[fol. 330] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HENRY G. WELLS, JR.

This day personally appeared before me the undersigned authority Henry G. Wells, Jr., who, after being duly sworn, deposes and says :-

That he is the General Manager of Radio Station, WCOA, operating at Pensacola Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members and of all members of foreign societies affiliated with said Society. That said license agreement was entered into April 20, 1933 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$400.00 per year, plus 5% of its net income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The [fol. 331] sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of

said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Henry S. Wells, Jr.

Sworn to and subscribed before me this 25 day of February, A. D. 1938. Phillip Sanchez, Notary Public. My Commission expires Feb'y. 8, 1941. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFADAVIT OF BRADLEY SUDDUTH

This day personally appeared before me the undersigned authority Bradley Sudduth who, after being duly sworn, deposes and says:

[fol. 332] That he is the manager of Belmont & Gulf theatres, operating at Pensacola, Florida. That said theatres have a contract or license agreement with the American Society of Composers, Authors and Publishers, authorizing the public performance for profit at said theatres of the copyrighted musical compositions of all members of said Society and of all members of foreign societies affiliated with said Society. That subsequent to June 9, 1937, said Society has been refusing to accept checks in payment of the license fees provided for in the aforesaid license agreement; that said theatres are prepared to make the payments required by said contract and will make the said payments at any time the said Society will accept the amount provided for in said license agreement.

(Signed) Bradley Sudduth.

Subscribed and sworn to, before me, this 25 day of February, 1938, A. D. Henry G. Wells, Notary Public, State of Florida at Large. My Commission expires April 21, 1940. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD H. MEYER

This day personally appeared before me the undersigned authority Harold H. Meyer who, after being duly sworn, deposes and says:

[fol. 333] That he is the manager of Radio Station WSUX, operating at St. Petersburg, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into January 1st, 1936 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937 a check for each monthly payment has been mailed to said Society at its New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed). Harold H. Meyer,

Sworn to and subscribed before me this 24th day of February 1938. Emma B. Miller, Notary Public, State of Florida at Large. My Commission Expires Jan. 20, 1940. (Notarial Seal.)

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAROLD P. DANFORTH

This day personally appeared before me the undersigned authority Harold P. Danforth who, after being duly sworn, deposes and says:

That he is the Vice President & General Manager of Radio Station WDBO, at Orlando, Florida, operated by the Orlando Broadcasting Company, Inc.; that said Radio Station has a contract or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into January 20, 1936 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$600.00 per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment has been mailed to said [fol. 335] Society at its New York Office and has been returned unopened. The sealed envelope containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Harold P. Danforth.

Sworn to and subscribed before me this 24th day of February, A. D. 1938. Emily M. Beckett, Notary public, State of Florida at Large. My Commission expires Nov. 10, 1941. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF W. WALTER TISON

This day personally appeared before me the undersigned authority W. Walter Tison, who, after being duly sworn, deposes and says:

[fol. 336] That he is the manager of Radio Station WFLA, operating at Tampa, Clearwater, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into Nov. 18, 1932 and extended on Jan. 15, 1930 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$— none per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937 a check for each monthly payment has been mailed to said Society at its New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time,

(Signed W. Walter Tison.)

Sworn to and subscribed before me this 24th day of February, 1938. C. O. Faircloth, Notary Public, State of Florida at Large. My Commission expires Nov. 6, 1938. (Notarial Seal.)

[fol. 337] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF L. S. MITCHELL

This day personally appeared before me the undersigned authority, L. S. Mitchell who, after being duly sworn, deposes and says:

That he is the manager of Radio Station WDAE, operating at Tampa, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into October 1st, 1932 and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$500.00 per year, plus 3% on 1st \$25,000.00; 5% on all over \$25,000.00 of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937 a check for each monthly payment has been mailed to said Society at its [fol. 338] New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) L. S. Mitchell.

Sworn to and subscribed before me this 24th day of February 1938. Virginia L. Janes, Notary Public, State of Florida at Large. My Commission expires Aug. 5, 1941. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE H. MASON

This day personally appeared before me the undersigned authority George H. Mason who, after being duly sworn, [fol. 339] deposes and says:

That he is the Manager of Tampa Terrace hotel, operating at Tampa, Florida. That said hotel has a contract or license agreement with the American Society of Composers, Authors and Publishers, Authorizing the public performance for profit at said hotel of the copyrighted musical compositions of all members of said Society and of all members of foreign societies affiliated with said Society. That subsequent to June 9, 1937 said Society has not sent bills for payment of the license fees provided for in the aforesaid license agreement; that said hotel is prepared to make the payments required by said contract and will make the said payments at any time the said Society will accept the amount provided for in said license agreement.

(Signed) George H. Mason.

Subscribed and sworn to, before me, This 24th day of February, 1938 A. D. Virginia L. Janes, Notary Public, State of Florida at Large. My Commission expires Aug. 5, 1941. (Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HAL I. LEYSHON

This day personally appeared before me the undersigned authority, Hal I. Leyshon, who, after being duly sworn, deposes and says:

[fol. 340] That he is the Vice-President of Radio Station WIOD, operating at Miami, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society mem-

bers, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into September 20, 1932 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of One Thousand (\$1,000) Dollars per year, plus five (5%) per cent of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Hal I. Leyshon.

Sworn to and subscribed before me this 25 day of February A. D. 1938. Martha Marsh, Notary Public, State of Florida at Large. My Commission Expires July 5, 1940. (Notarial Seal.)

[fol. 341] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. F. SMILEY

This day personally appeared before me, the undersigned authority, J. F. Smiley, who after being duly sworn, deposes and says:

That he is the Manager of Radio Station WLAK, operating at Lakeland, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted

musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into May 1, 1936, and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$100.00 per year, plus 5 per cent of its net receipts. That the payments aforesaid are usually made each month and that subsequent to June 9, 1937, checks in payment of moneys due the Society under said Contract were mailed from month to month to the said Society at its New York office and the same returned unopened; that after [fol. 342] four of five of the envelopes, containing said payments, had been returned unopened, the said Radio Station has discontinued mailing further payments but monthly statements of amounts due the Society have been made each month under oath and are available at any time the Society will accept the same; that the envelopes containing said checks have been kept by the station and the station stands ready to deliver the same or make payment of same to the Society at any time the same will be accepted.

J. F. Smiley

Sworn to and subscribed before me this 24th day of February, A. D. 1938. Myrtle Barksdale, Notary Public. My commission expires Dec. 3, 1940.
(Seal.)

[fol. 343] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GARLAND POWELL

This day personally appeared before me the undersigned authority, Garland Powell, who, after being duly sworn, deposes and says:

That he is the director of Radio Station WRUF, operating at Gainesville, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors, and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into October 3

1932, and expires December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$ (none) per year, plus 5% of its gross income from advertising. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly payment for the months of June to November, 1937, inclusive, has been [fol. 344] mailed to said Society at its New York office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937 and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is and will continue to be available for the payment of the respective checks at any time.

Garland Powell.

Sworn to and subscribed before me this 26th day of February, 1938. Helen Watson, Notary Public, State of Florida at Large. My commission expires Nov. 11, 1939. (Seal.)

[fol. 345] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RUSSELL GILL

This day personally appeared before me the undersigned authority, Russell Gill, who, after being duly sworn, deposes and says:

That he is the Assistant Secretary of Pensacola Bridge Corporation operating Pensacola Beach Casino at Pensacola, Florida. That said Corporation has a contract or license agreement with the American Society of Composers, Authors and Publishers, authorizing the public performance for profit at Pensacola Beach Casino of the copyrighted

musical compositions of all members of said Society and of all members of foreign societies affiliated with said Society. That subsequent to June 9, 1937, said Society has been refusing to accept checks in payment of the license fees provided for in the aforesaid license agreement; that said corporation is prepared to make the payments required by said contract and will make the said payments at any time the said Society will accept the amount provided for in said license agreement.

Russell Gill, Assistant Secretary

Subscribed and sworn to, before me, this 25th day of February, 1938. H. M. Guenther, Notary Public, State of Florida at Large. My Commission expires Aug. 26, 1941. (Seal.)

[fol. 346] IN UNITED STATES DISTRICT COURT.

[Title omitted]

AFFIDAVIT OF F. W. BORTON

This day personally appeared before me the undersigned authority F. W. Borton who, after being duly sworn, deposes and says:

That he is the President of the Miami Broadcasting Company owner of Radio Station WQAM, operating at Miami, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into September 1st, 1932 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$1,000.00 per year, plus 3% of its gross income. That the payments aforesaid are made each month and that [fol. 347] subsequent to June 9, 1937, a check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the

Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

Miami Broadcasting Company, (Signed) F. W. Borton, President. (Seal.)

Sworn to and subscribed before me this 25th day of February A. D. 1938. (Signed) Marion Crutchfield, Notary Public, State of Florida at Large. My Commission Expires Dec. 13th, 1941. (Seal.)

[fol. 348] IN UNITED STATES DISTRICT COURT

{Title omitted}

AFFIDAVIT OF GLENN MARSHALL, JR.

This day personally appeared before me the undersigned authority Glenn Marshall, Jr. who, after being duly sworn, deposes and says:

That he is the Sec'y & Treasurer of Radio Station WMBR, operating at Jacksonville, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into January 1, 1936 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$500.00 per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a [fol. 349] check for each monthly payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have

been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is; and will continue to be available for the payment of the respective checks at any time.

(Signed) Glenn Marshall, Jr.

Sworn to and subscribed before me this 24 day of February A. D. 1938. Paul G. Baxter, Notary Public, State of Florida at Large. My Commission expires Jan. 21, 1939. (Notarial Seal.)

[fol. 350] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GILBERT FREEMAN

This day personally appeared before me the undersigned authority, Gilbert Freeman, who, after being duly sworn, deposes and says:

That he is President of Florida Broadcasters, Inc., operating Radio Station WTAL at Tallahassee, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members and of all members of foreign societies affiliated with said Society that said agreement was entered into August 20, 1935 and is to expire December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to said Society the sum of One Hundred Dollars (\$100.00) per year plus five per cent (5%) of its gross income that the payments aforesaid are to be made monthly.

Since June 9, 1937, the said Society has declined to receive through the mails monthly payments for said service and

has returned unopened all checks and correspondence from the said Radio Station to the said Society. The said Radio [fol. 351] Station has the money in the bank to pay all checks, accounts or moneys due the said Society under the said license agreement whenever said Society will accept same and said moneys will continue to be available for the payment of all checks, accounts, or moneys due said Society.
(Signed) Gilbert Freeman.

Sworn to and subscribed before me this 28th day of February A. D. 1938. A. R. Mann, Notary Public, State of Florida at Large. My Commission Expires May 6, 1940. (Notarial Seal.)

[fol. 352] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE A. HAZLEWOOD

This day personally appeared before me the undersigned, authority George A. Hazlewood who, after being duly sworn, deposes and says:

That he is the Vice President and General Manager of Radio Station WJNO, operating at West Palm Beach, Florida; that said Radio Station has a contract, or license agreement, with the American Society of Composers, Authors and Publishers, authorizing said Radio Station to perform publicly for profit the copyrighted musical compositions of all said Society members, and of all members of foreign societies affiliated with said Society. That said license agreement was entered into August First, 1936 and expired December 31, 1940. Pursuant to said license agreement the said Radio Station is obligated to pay to the said Society the sum of \$100.00 per year, plus 5% of its gross income. That the payments aforesaid are made each month and that subsequent to June 9, 1937, a check for each monthly [fol. 353] payment has been mailed to said Society at its New York Office and has been returned unopened. The sealed envelopes containing said checks have been kept by the station for delivery to the Society and at any time the Society will accept same. This practice has been followed each month since June 9, 1937, and said Radio Station will

continue to forward its monthly check to the said Society in accordance with the terms of the license agreement aforesaid. That the funds represented by all the checks sent to the said Society under the provisions of said license agreement have been considered by said Station as monies withdrawn from its bank account and that the aggregate amount thereof is, and will continue to be available for the payment of the respective checks at any time.

(Signed) Geo. A. Hazlewood.

Sworn to and subscribed before me this 25th day of February A. D. 1938. William A. Cobb, Jr., Notary Public. Com. Expires 8/1/1939. (Notarial Seal.)

[fol. 354] IN UNITED STATES DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

GENE BUCK, Individually and as President of the American
Society of Composers, Authors and Publishers, etc., et
al., Complainants,

vs.

CARY D. LANDIS, Individually and as Attorney General of
the State of Florida, et al., Defendants.

MEMORANDUM OPINION—Filed April 5, 1938

PER CURIAM:

The Complainants, American Society of Composers, Authors and Publishers, an unincorporated association organized and existing under the laws of the State of New York. Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others filed their bill of complaint on the 7th day of February 1938 against the Attorney General of the State of Florida and a number of State Attorneys, in which bill it is sought to enjoin the defendants from enforcing the provisions of an Act of the Florida Legislature passed during the Session of 1937, which law declares any combination of persons. [fol. 355] firms, or corporations which determine the amount of money to be paid to it or to its members for the purpose of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions when such com-

bination is composed of a substantial number of all musical composers, copyright owners or their heirs, successors or assigns, to be an unlawful monopoly and its purpose would be in restraint of trade. It makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization either in Florida or elsewhere if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Florida, for the purpose of preventing free competition between different copyright owners. There are penalty provisions applying where any attempt is made to collect license fees by the owners of copyright and requiring authors, composers and publishers to specify on any published musical composition prepared for use in Florida the selling price of such composition. Other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the State of Florida.

[fol. 356] The bill alleges that the enforcement of this Act will violate rights granted to them by the copyright Act of Congress; that it is in violation of the Federal Constitution and impairs the terms of certain existing contracts held by these plaintiffs.

The cause is before this Court upon application for interlocutory injunction; upon the bill of complaint, affidavits filed therewith and upon motion to dismiss the bill of complaint.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act to the irreparable injury of plaintiffs unless such injunction order is issued.

It appearing to the Court that plaintiffs have shown that great damage will be inflicted upon them if preliminary injunction is not granted, and that there is grave doubt of the constitutionality of the Act;

It is considered by the Court that an order be entered granting such interlocutory injunction and that the motion to dismiss the bill be denied.

Rufus E. Foster, Circuit Judge. Louie W. Strum, District Judge. A. V. Long, District Judge.

[fol. 357] IN UNITED STATES DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

GENE BUCK, Individually and as President of the American
Society of Composers, Authors and Publishers, etc., et
al., Complainants,

vs.

CARY D. LANDIS, Individually and as Attorney General of
the State of Florida, et al., Defendants

ORDER GRANTING MOTION FOR INTERLOCUTORY INJUNCTION,
ETC.—Filed April 5, 1938.

This cause coming on to be heard and the same having
been argued by Counsel for the respective parties, and the
Court having inspected the record and the briefs filed:

It is ordered:

1st. That the application for interlocutory injunction be
and the same is granted.

2nd. That the defendants, Cary D. Landis, individually
and as Attorney General for the State of Florida; E. Dixie
Beggs, Jr., individually and as State Attorney for the First
Judicial Circuit of Florida; O. C. Parker, Jr., individually
[fol. 358] and as State Attorney for the Second Judicial
Circuit of Florida; A. K. Black, individually and as State
Attorney for the Third Judicial Circuit of Florida; Wil-
liams A. Hallows, III., individually and as State Attorney
for the Fourth Judicial Circuit of Florida; J. W. Hunter,
individually and as State Attorney for the Fifth Judicial
Circuit of Florida; Chester B. McMullen, individually and
as State Attorney for the Sixth Judicial Circuit of Florida;
Murray Sams, individually and as State Attorney for the
Seventh Judicial Circuit of Florida; J. C. Adkins, indi-
vidually and as State Attorney for the Eighth Judicial Cir-
cuit of Florida; Murray W. Overstreet, individually and as
State Attorney for the Ninth Judicial Circuit of Florida;
L. Grady Burton, individually and as State Attorney for
the Tenth Judicial Circuit of Florida; G. A. Worley, indi-
vidually and as State Attorney for the Eleventh Judicial
Circuit of Florida; Roy D. Stubbs, individually and as State
Attorney for the Twelfth Judicial Circuit of Florida; J.
Rex Farrior, individually and as State Attorney for the

Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; and each of them individually and in their respective capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained until the further order [fol. 359] of this Court from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3rd. That the motion made by the defendants to dismiss the bill of complaint be and the same is denied.

[fols. 360-364] 4th. That the defendants be given thirty (30) days from the date hereof to answer.

This order is made conditional upon the plaintiffs filing herein within thirty (30) days a bond in the sum of five thousand (\$5,000.00) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order; said bond to be approved by the Clerk of the United States Court for the Northern District of Florida.

Done and ordered this the 4 day of April, A. D. 1938.

Rufus E. Foster, Circuit Judge. Louie W. Strum,
District Judge. A. V. Long, District Judge.

[fol. 365] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 25, 1938.

Come now the defendants in the above entitled cause and file the following assignments of error upon which they will rely in the prosecution of the appeal from the interlocutory order granting temporary injunction made and entered in this cause on the 4th day of April, A. D. 1938, and say that the Court erred in the following respects, to-wit:

First Assignment of Error

The Court erred in taking jurisdiction of the cause for any purpose other than to dismiss the bill of complaint for want of jurisdiction as a Federal Court.

Second Assignment of Error

The Court erred in denying the defendants' Motion to Dismiss the Bill of Complaint.

[fol. 366] Third Assignment of Error

The Court erred in denying defendants' Motion to Dismiss the Bill of Complaint for want of jurisdiction as a Federal Court.

Fourth Assignment of Error

The Court erred in denying defendants' Motion to Dismiss the Bill of Complaint for want of jurisdiction as a Court of Equity.

Fifth Assignment of Error

The Court erred in denying defendants' Motion to Dismiss the Bill of Complaint on the ground that Chapter 17807, Laws of Florida, 1937, is a valid statutory enactment.

Sixth Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937.

Seventh Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937, without stating its finding of fact and conclusions of law as required by Federal Equity Rule 701, as amended. (*)—See below.

Eighth Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937, without determining that the unconstitutionality of said statute was reasonably free from doubt.

[fol. 367]

Ninth Assignment of Error

The Court erred in entering its interlocutory order dated April 4th, 1938, temporarily restraining and enjoining the defendants from enforcing the provisions of Chapter 17807, Laws of Florida, 1937, in that the granting of such temporary injunction was an abuse of discretion.

Tenth Assignment of Error

The Court erred in not finding and holding that the defendants were only charged with the duty of enforcing Section 1 of Chapter 17807, Laws of Florida, 1937, and the sections dependent thereon, viz.: Sections 3, 4-A, 4-B, 5-A, 5-B, 6-A, 7-B, 8, 9; that said sections are valid enactments under the police powers of the State of Florida, and that the remaining sections of said Act are without the scope of this suit.

(Signed) Cary D. Landis, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Andrew W. Bennett; Lucien H. Boggs, Solicitors for Defendants.

(*)—"At the time of filing this Assignment of Errors, as required by Rule 9 of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 701, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein."

[fol. 368-410] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 25, 1938

This day came the plaintiffs by their solicitors, and having filed and presented to the Court their petition for the allowance of any appeal to the Supreme Court of the United States, together with their assignment of errors and a statement of basis of appellate jurisdiction pursuant to Rule 12 of said Supreme Court, and it appearing that an appeal to the Supreme Court of the United States is allowable under United States Code Title 28, section 380:

It is Hereby Ordered that said appeal be allowed upon the filing of a bond in the sum of \$500.00, with good and sufficient surety to be approved by the Court.

Dated at Gainesville, Florida, this 25 day of April 1938.

(Signed) A. V. Long, District Judge.

[fol. 411] IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 412] NOTICE OF HEARING—Filed March 1, 1938

To Fred Cone, as Governor of the State of Florida, Carl D. Landis, individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida, O. C. Parker, Jr., individually, and as State Attorney for the Second Judicial Circuit of Florida, A. K. Black, individually, and as State Attorney for the Third Judicial Circuit of Florida, William A. Hallows, III, individually and as State Attorney for the Fourth Judicial Circuit of Florida, J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida, Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida, J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida, Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Circuit of Florida, L. Grady Burton, individually.

and as State Attorney for the Tenth Judicial Circuit of Florida, G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida, Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida, J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida, John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida, Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida:

[fol. 413] You and each of you are hereby notified that the complainants in the above entitled cause, did, on the 7th day of February, 1938 file in the above entitled Court at Gainesville, Florida, a Bill of Complaint supported by the affidavit of Gene Buck annexed thereto, which said complaint prayed for a temporary and permanent injunction restraining the defendants and each of the defendants in the above entitled cause from bringing directly or indirectly or permitting to be brought directly or indirectly any proceeding at law or in equity for the purpose of enforcing Senate Bill No. 679 of the State of Florida, enacted by the Legislature of the State of Florida in its Regular Session held in the year 1937, approved by the Governor of the State of Florida on June 9, 1937 and filed in the office of the Secretary of State of the State of Florida, on June 10, 1937, relating to the use of copyrighted songs and music, against the complainants or any of them or against other similarly situated, and that the complainants heretofore moved the Court for a temporary injunction in the form of an interlocutory decree and requested that the same be held and determined by three Judges, as provided by Section 380, Title 28 of the United States Code Annotated as amended.

You and each of you are further notified that the Honorable Rufus E. Foster, one of the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, and the Honorable Augustus V. Long, one of the Judges of the United States District Court for the Northern District of Florida, and the Honorable Louis W. Strum, one of the [fol. 414] Judges of the United States District Court for the Southern District of Florida, heretofore made an order setting the complainants' application for a temporary injunction in said cause for hearing before the Court at the Court Room in the Federal Building in the City of New

Orleans, Louisiana on the 3rd day of March, 1938, at 10:00 o'clock in the forenoon of that day before the three Judges hereinbefore named.

You are further notified that the said hearing before the said three Judges will be held on the 3rd day of March, 1938 at 10 o'clock in the forenoon of that day in the Federal Building at New Orleans, Louisiana, as provided in said order, and that the same will be heard upon the Bill of Complaint, the Motion for a Temporary Injunction and the Affidavits of Gene Buck, Walter S. Fisher, Saul H. Bornstein, Gustave Schirmer, Anne Paul Nevin, Deems Taylor and Ella Herbert Bartlett, heretofore filed herein, and such other proof as may be submitted at such hearing in accordance with said order and the determination of the Court.

Dated, this 19th day of February, 1938.

(Signed) Wideman, Wardlaw & Caldwell, Attorneys
for Complainants.

Received a copy of the above and foregoing notice this 21st day of February, A. D. 1938.

Fred P. Cone, as Governor of the State of Florida.

Received a copy of the above and foregoing notice this — day of February, A. D. 1938.

—, Individually and as Attorney General of
the State of Florida.

[fols. 415-419] Bond on injunction for \$5,000.00, approved and filed April 13, 1938, omitted in printing.

[fols. 420-421], Notice of injunction order and filing of bond with proof of service thereof, filed April 18, 1938, omitted in printing.

[fol. 422] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 17,
1938

This suit having been duly commenced on February 7th, 1938, by filing a subpoena and bill of complaint in this Court

and service of copies thereof having been made upon all the defendants (except "John Doe" and "Richard Roe"), and the complainants having moved for a temporary injunction, and due notice of said motion having been made upon the defendants herein as well as upon the Governor and Attorney General of the State of Florida, and the defendants, State Attorneys, having appeared herein generally (with the exception of the defendants "John Doe" and "Richard Roe"), and the defendants having duly moved to dismiss the complaint and to deny the motion for temporary injunction; and all of said motions having duly come on for argument and having been heard on March 3rd, 1938, at the Federal Courthouse in New Orleans, Louisiana, this Court hereby makes the following findings of fact and conclusions of law.

[fol. 423]

Findings of Fact

1. At the 1937 Session of the Legislature of Florida there was passed by said Legislature a Bill designated as Chapter 17807, Senate Bill No. 679, and said Bill was signed by the Governor of that State on June 9th, 1937, and made effective immediately. Said statute is referred to as the "State Statute" hereinafter; a copy is hereto annexed.

2. The complainant American Society of Composers, Authors and Publishers (hereinafter referred to throughout these findings as the "Society") was at all the times hereinafter mentioned and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City and State of New York, in the Southern District of New York. The membership of the Society constitutes a substantial number of persons, firms and corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, to-wit: a membership of one thousand, consisting of authors, composers and publishers of musical works; said Society has contracts now valid and subsisting between it and similar societies situated in the countries of the civilized world, which foreign societies have a membership of approximately forty-four thousand and under which contracts the Society licensed to users of music within the United States, including the State of Florida, until the enactment of the State Statute hereinafter mentioned, the

right to publicly perform for profit all of the copyrighted musical compositions controlled by said foreign societies, as well as by the Society.

3. All of the complainants are citizens of the United States and residents of the State of New York, except complainant, Anne Paul Nevin, who is a resident of the State of Maine; and the defendants are citizens and residents of the State of Florida, and officers of the State of Florida, duly elected, appointed and qualified, empowered, directed [fol. 424] and charged by the said state statute with the duty of enforcing the criminal and civil provisions thereof.

4. This action is a suit in equity arising under the Constitution and laws of the United States and the matter in controversy exceeds \$3,000 exclusive of interest and costs.

5. Under mutual working arrangements with societies in the foreign countries, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performances for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the rights vested in such foreign societies with respect to the licensing of their performing rights in the United States are not conditioned upon and are entirely independent from the sale of copies of sheet music and the price fixed therefor. The right to perform the musical compositions embraced in the catalogues of such foreign societies are included in the blanket licenses issued to individual licensees by the Society in the United States. Such foreign societies represent 44,000 members who are scattered throughout the world; they are not required to file copies of their respective musical compositions in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid.

6. Because of the provisions of Section 1 (e) of the Copyright Act of 1909, as amended, under which any manufacturer of parts of instruments serving to repro-

duce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions without the express consent of the copyright proprietors, including complainants. The copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electrical transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public performance for profit thereof.

7. Complainants will be able to license users of their music in the State of Florida without doing any act in said State, but unless the injunction prayed for is granted, complainants will be unable to issue any licenses from without the State of Florida without incurring the penalties of said [fol. 426] State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies are being, and have been constantly performed in the State of Florida and each and every county and district therein, and will continue to be performed therein.

8. Said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted

works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books, and periodicals, none of which are affected by the said State Statute.

9. Said State Statute attempts to vest in the courts of Florida the rights to determine the ownership of complainants' copyrights without properly securing jurisdiction over complainants, who are not residents or domiciled within the State of Florida, and are not doing business therein, and who have no agency within said State and have no property within said State which has a situs.

10. Said State Statute is in its terms so drastic and the penalties attached to the violation of the terms thereof are so great that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without such State if the public performance for profit of such music may be reproduced or performed within such State. There are fourteen judicial circuits in the State of Florida, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, and the foreign societies with which the Society has reciprocal arrangements; and if complainants attempt to issue licenses or collect from licensees or [fol. 427] attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions and unless defendants are restrained complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers, radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by any other means of rendition whatsoever within the State of Florida from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in such State; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of such State; complainants and

others similarly situated, as well as the Society, were compelled from the effective date of the State Statute, until the date of the granting of temporary injunction, herein, to desist from licensing the public performance for profit of their copyrighted musical compositions in such State and were deprived during such period of all sources of revenue therefrom, and were denied the privileges granted to them by the Copyright Act; and the Society was compelled to desist from enforcing collection of payments under existing contracts between it and users during such period and was denied liberty of contract and was compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions; and complainants would continue to suffer as aforesaid but for the granting of the injunction herein; and complainants and [fol. 428] the Society and its affiliated societies, were hindered, delayed and impeded in enforcing their rights and remedies under the Copyright Act in the Federal Courts located in the State of Florida for infringements committed by users within such State by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated were unable to detect and sue for infringement of their copyrighted musical works within the State of Florida during such period.

11. Complaints have no adequate remedy at law and are relievable only in this Court of Equity, and if complainants were not afforded the equitable relief prayed for herein but were required to resist criminal prosecutions and other suits or proceedings instituted under the State Statute, it would result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

[fol. 429]

Conclusions of Law

I. The bill of complaint states facts sufficient to constitute a cause of action against each and every one of the defendants.

II. The State Statute is not a reasonable exercise of the police power of the State of Florida, and the penalties and confiscatory provisions provided for therein are not reasonably necessary to meet any alleged evil; enactment of the State Statute was not necessary to protect, nor does it serve the public interest of the State of Florida; the object, purpose and effect of the Statute is to take the copyrighted musical compositions of the complainants, and others similarly situated, for a private purpose, to-wit; to benefit the 367 users within the State of Florida; the said State Statute discriminates against, and in fact, confiscates the complainants' copyrighted musical compositions as well as those of others similarly situated; it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

III. The State Statute is an invasion of complainants' constitutional rights in the following respects:

(a) It interferes with and destroys the pattern of the copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure uniformity and certainty in the field of copyright.

(b) It denies to complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein denies to the complainants due process of law.

(c) It impairs obligations of contracts entered into between complainants and 367 users of music within the State [fol. 430] of Florida, and contracts between members of the Society and the Society, and between the Society and similar societies operating in foreign countries, and contracts between writers and composers and their respective publishers.

(d) It interferes with complainants' liberty of contract in the State of Florida and elsewhere.

(e) It deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

IV. The said State Statute is vague, uncertain and indefinite and fails to apprise complainants, and others similarly situated of what acts they may omit or commit which would constitute a crime under said State Statute.

V. The said State Statute subjects complainants to a multiplicity of suits by each of the 367 users within the State of Florida with whom they have contracts, by each of the State Attorneys in the State of Florida, and by the Attorney General of said State.

VI. The penalties, civil and criminal, and the forfeitures provided for in said State Statute are harsh, oppressive and unreasonable, and such penalties and forfeitures are cruel and unusual.

VII. The said State Statute violates Article I. Sections 8, 9, and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

VIII. Complainants have no adequate remedy at law and are relievable only in this Court of Equity, and if complainants are not afforded the equitable relief prayed for in the [fol. 431] bill of complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said State Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate, and unless an injunctional order is issued complainants will be irreparably damaged.

IX. Complainants are entitled to an injunction enjoining and restraining, until the further order of this Court, the defendants and each of them individually and in their capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society

and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to, detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

[fol. 432] X. That a bond in the sum of \$5,000 conditioned upon the payment to defendants of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined by this order, will adequately protect defendants against any injury that may be suffered in the event that the injunction pendente lite entered herein shall not be made permanent.

XI. The State Statute constitutes an attempt to restrict and to regulate the right of complainants to the full enjoyment of the exclusive rights granted them by the laws of the United States, generally known as the Copyright Laws.

XII. That the motion to dismiss the complaint be denied.

XIII. That this Court has jurisdiction of this suit.

XIV. That the application for interlocutory injunction and the same is granted.

Dated at Gainesville, Florida, this May 17, A. D. 1938

Rufus E. Foster, United States Circuit Judge. Long
W. Strum, United States District Judge. A. T.
Long, United States District Judge.

[fols. 433-446] Exhibit "E" (Florida Statute—Senate Bill No. 679) omitted. Printed side page 76, ante.

[fol. 447] IN UNITED STATES DISTRICT COURT

[Title omitted]

**MOTION FOR LEAVE TO AMEND STATEMENT AS TO JURISDICTION
AND ASSIGNMENT OF ERRORS—Filed August 8, 1938**

Come now defendant State's Attorneys and respectfully move the Court for an Order amending the Statement as to Jurisdiction and Assignment of Errors filed herein on April 25, 1938, in the following respects, to-wit:

1. Statement as to Jurisdiction:

By inserting at the end of paragraph (g) 1 and (g) 6, respectively, an asterisk; and at the end of said Statement [fol. 448] as to Jurisdiction a further asterisk followed by a note which shall read: .

"At the time of filing this Statement as required by Rule 12 Paragraph I of the Supreme Court of the United States; no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70¹2, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein. However, said findings and conclusions do not persuasively show the need for nullifying the action of the Legislature of the State of Florida and do not make it persuasively appear that the unconstitutionality of the statute is reasonably free from doubt."

2. Assignment of Errors:

By inserting at the end of the Seventh Assignment of Error an asterisk; and at the end of the Assignment of Errors a further asterisk followed by a note which shall read:

"At the time of filing this Assignment of Errors, as required by Rule 9 of the Supreme Court of the United States, no findings of fact or conclusions of law whatever had been made or filed by the Court, although the Court was required to do so by Equity Rule 70¹2, as amended November 25, 1935. Afterward (May 17, 1938) findings of fact and conclusions of law were made and filed as appears by Transcript of Record herein."

and for grounds of this Motion said defendants show:-

That each of said amendments is necessary in order to explain to the Supreme Court of the United States the apparent conflict between the language employed by the [fols. 449-452] defendants in said Statement as to Jurisdiction and Assignment of Errors, respectively, and the facts as disclosed by the Record that the findings of fact and conclusions of law were actually filed. The defendant State's attorneys further move the Court to direct the Clerk of this Court to include in the Transcript of Record transmitted to the Supreme Court of the United States the Order extending Time for Filing the Transcript of Record in this case filed on May 31st, 1938.

(Signed) Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett, Attorneys for Defendant State's Attorneys.

[fol. 453] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 454] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY THE APPELLANTS, AND OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF—Filed August 15, 1938.

The points relied upon by the Appellant State's Attorneys for a reversal of the Order of the Special Statutory Three Judge Court granting Appellees' Motion for Temporary Injunction are, as follows:-

First. The lower Court was without jurisdiction to entertain the Bill of Complaint, or to grant the Temporary Injunction [fol. 455] because it affirmatively appeared that it had no jurisdiction as a Federal Court, in that the requisite jurisdictional amount of \$3,000.00 exclusive of interest and costs, was not involved, and the suit was not one arising under the copyright laws of the United States, or otherwise cognizable in a Federal Court in the absence of such jurisdictional amount.

Second. The only portions of the Florida Statute attacked by the Bill of Complaint, with the enforcement of which the Appellants, (defendants below) are charged, viz: Sections 1, 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9, are valid enactments under the police powers of the State of Florida, and the validity of the remaining Sections of said Act need not be considered in this suit.

Third. The lower Court abused its discretion in granting the Temporary Injunction on April 4, 1938, without first, or contemporaneously therewith, stating its findings of fact and conclusions of law, as required by Equity Rule 70^{1/2}, as amended; even though such findings and conclusions were later made and filed on May 17, 1938, and after entry of this appeal.

[Vol. 456] **Fourth.** The lower Court abused its discretion in granting the Temporary Injunction, without first determining that the unconstitutionality of the State Statute was reasonably free from doubt.

Fifth. The lower Court abused its discretion in granting Temporary Injunction in view of the uncontradicted affidavit of Cary D. Landis, Attorney General of the State of Florida, (under whose direction all legal action for the enforcement of the provisions of the State's Statutes must be taken), which showed affirmatively and positively that no legal proceedings for the enforcement of said Statute were pending, threatened or contemplated.

Sixth. The Appellees, (Plaintiffs below) come into equity with unclean hands, by asking its aid in the furtherance of their confessedly monopolistic and price-fixing activities, and are not entitled to injunctive relief.

The parts of the record necessary for the consideration of the above points relied upon by Appellants are:

(1) Bill of Complaint, filed February 7, 1938, and all Exhibits thereto.

[Vol. 457] (2) All affidavits filed February 7, 1938 by Plaintiffs in support of their Motion for Temporary Injunction.

(3) Defendants' Motion to Dismiss Bill of Complaint, filed March 3, 1938.

(4) Defendants' Motion to deny Motion for Temporary Injunction and supporting affidavits, filed March 3, 1938.

(5) Memorandum Opinion of the Court, filed April 4, 1938.

(6) Order of Court entered April 4, 1938.

(7) Assignment of Errors, filed April 25, 1938.

(8) Statement as to Jurisdiction, filed April 25, 1938.

(9) Order allowing Appeal, entered April 25, 1938.

(10) Findings of Fact and Conclusions of Law, filed May 17, 1938.

Tyrus A. Norwood, Assistant Attorney General;
Lucien H. Boggs, Andrew W. Bennett, Attorneys
for Defendant States Attorneys.

[fols. 458-459] Proof of Service

STATE OF FLORIDA,
County of Leon:

On this day personally appeared before me a Notary Public in and for the State of Florida at Large, Tyrus A. Norwood, Assistant Attorney General, who, being first duly sworn, on oath says that he did on this day serve, Messrs. Wideman, Wardlaw & Caldwell, Attorneys for Appellees in the foregoing cause with a copy of Statement of Points relied upon by the Appellants, and of the parts of the record necessary for the consideration thereof. The service was made by mailing said copy sealed in an envelope addressed to said: Messrs. Wideman, Wardlaw & Caldwell, Attorneys at Law, West Palm Beach, Florida, with sufficient postage thereon to insure its delivery at destination, the same being mailed in the Post Office at Tallahassee, Florida, on this the — day of August, 1938.

Tyrus A. Norwood, Assistant Attorney General

Sworn to and subscribed before me this the 12 day of August, 1938. Evelyn Davis, Notary Public, State of Florida at Large. My Commission expires Mar. 7, 1939. (Seal.)

[fol. 460] [File endorsement omitted.]

[fol. 461] IN SUPREME COURT OF THE UNITED STATES

APPELLEES' STATEMENT OF ADDITIONAL PARTS OF THE RECORD
TO BE PRINTED—Filed August 18, 1938

The following parts of the record omitted from appellants' designation are believed to be necessary and material and should be printed in the record on appeal:

- (1) Order convening three-Judge Court filed February 7, 1938.
- (2) Notice of hearing on motion for temporary injunction served on the Governor of the State of Florida, and on defendants and acceptance of service thereof by them filed March 1, 1938.
- (3) Statement that appellees duly filed an injunction bond in the sum of \$5,000. on April 13, 1938, and that proof of service of notice of the filing thereof and of the injunction order were filed in the District Court on April 18, 1938.
- (4) Motion of appellants for leave to amend statement as to jurisdiction and assignment of errors, and order of [fol. 462] August 4, 1938 allowing amendments to statement as to jurisdiction and assignment of errors.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Appellees.

[fol. 463] [File endorsement omitted.]

Endorsed on cover: Enter George Couper Gibbs. File No. 42,761. N. Florida, D. C. U. S. Term No: 276. George Couper Gibbs, Individually and as Attorney General of the State of Florida, et al., appellants, vs. Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al. Filed August 15, 1938. Term No. 276, O. T., 1938